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NORTH CAROLINA REPORTS,

VOL. 5.

REPORTS OF CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

NORTH CAROLINA,

FROM THE YEAR 1804 TO THE YEAR 1810, INCLUSIVE.

BY A. D. MURPHEY, of Orange County.

(Vol. I.)

RALEIGH, N. C.:
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1894.

NAMES OF CASES REPORTED IN THIS VOLUME.

A.

Adm'r of Wilcox *v.* Wilkinson's executor 11
—— of Jacob Blount *v.* Charles Johnston's executor 36
—— of Mathews *v.* Daniel, executor, &c. 42
Alston's executors *v.* Jones' devisees 45
Arrington, adm'r of Philips, *v.* Coleman 102
Adm'r of King *v.* Bryant's ex'r 131
——of Branch *v.* Bowen Branch administrator, &c. 132
—— of R. Kay *v.* Webb *et al.* .. 134
—— of Richard Quince *v.* ex'r of Parker Quince 160
Allen's executors *v.* Watson .. 189
Arrington *v.* Culpepper 297
Allison *v.* Gregory & Sons and Kirkland 233
Alston and wife *et al. v.* Branch and Arrington 356
Adams' ex'rs *v.* Thos. J. Robeson 392

B.

Arthur Bell *v.* Benjamin Bell. 95
Bryson *et al. v.* Davidson's executors 143
Backhouse *v.* Sneed 173
J. Bateman *v.* Mariner and wife 176
Blackledge *v.* Scales 179
Benzien *et al. v.* Lenoir *et al.* . 194
Branton *v.* Dixon 225
Bray's orphans *v.* Brumsey, former guardian 227
Patrick Brown *v.* Frazier & Pulliam 411

C.

James Critcher *v.* Wm. Pannel 32
Churchhill and Lamotte *v.* administrator of Abr. Comron 39
Comm'rs of Fayetteville *v.* W. James 40
Colson's ex'rs *v.* Wade's ex'rs. 43
Cardwell's heirs *v.* Brodie 97
Child, assignee, &c. *v.* Devereux 398
Cartwright *v.* Godfrey *et al.* .. 422
Carlton *v.* Bloodworth 424
Critcher *v.* Walker 488

D.

Den on demise of Stanly *v.* Turner 14
——— of Trustees of the University *v.* Foy and Bishop .. 58
Dickenson *et al. v.* Stewart *et al* 99
Den on Demise of Gibson *v.* Shearer 114
——— of Edward Bryan *v.* Jeremiah Parsons, Jr. 152
——— of Strother *v.* Cathey. 162
——— of Trustees of the University *v.* Campbell 185
Davis *v.* Lancaster, late sheriff, &c. 255
Den on demise of Jiggitts *et al.* *v.* Maney 258
——— of Cleveland *v.* Grime 268
——— of Bickerstaff *v.* Dellinger 272
——— of Martin *v.* Lucey .. 311
Dudley *v.* Carmolt 339
Den on demise of Dickenson *et al. v.* Jordan & Blount 380
——— of James Tyrrel *v.* Peter Mooney 401
——— of Evans *v.* Thomas Satterfield 413
——— of Penelope Clinton *v.* Enoch Herring 414
Duncan and wife *v.* adm'rs of Parish Self, dec'd 466
Den on demise of John Wilsay and wife *v.* Malachi Sawyer and wife 493
——— of Lindsay and wife *v.* John Burfoot 494

E.

Ellis *v.* George Gee, late sheriff, &c. 445
Exum *v.* Davie and Jones 475

F.

Fryer *v.* Blackmore's adm'r 94
Frederick Fonville *v.* Solomon Casey 389

G.

Gay *v.* Hunt 141
Eliza'th Gerard *v.* Slade Pierce 161

107978

The Governor *v.* H. B. Howard 168
Ruth Givins *v.* Edward Givins' executors and devisees 192
The Governor *v.* Horton 212
Grant *v.* Whitaker 231
Gardner *v.* Clark 283
The Governor *v.* H. B. Howard 465
Gibson *v.* Lynch 495

H.

Holding's ex'r *v.* Fred'k Holding 9
Heirs of Anthony B. Toomer *v.* heirs of Henry Toomer 93
Howard *v.* Person's adm'rs 100
Hostler's adm'rs *v.* Smith 103
Hawkins *v.* the county of Randolph 118
Hughes *v.* Hollingsworth 146
Holding's ex'r *v.* Smith 154
Hartman *v.* M'Alister 208
Hill *v.* Jones 211
Hill, adm'r, &c. *v.* Moore and Watters, executors, &c. 233
Howe *v.* O'Mally 287
Hauser & Bowman *v.* Mann & Black 410
Hamilton *v.* Allen Jones' ex'r. 441

J.

Mary Jones *v.* Willie Jones' ex'r 96
Jackson *v.* Anderson *et al* 137
Jones *v.* Sykes 281
Johnston, assi'ee, &c. *v.* Knight 293
Jackson *v.* Marshall's administrator and devisee 323

L.

Lanier *v.* Auld's administrator 138
Ledbetter *v.* Lofton, adm'r of Dunn 184
Same *v.* Same 224
Lash *et al. v.* Gibson 266
Leary's ex'rs *v.* Littlejohn and Bond 406

M.

James Moore *v.* Richard Simpson 33
John Moore *v.* Daniel Parker. 37
Mallison *v.* Howard 44
Moreland *v.* Majors, ex'r, &c.. 48
Merrill *v.* Sloan 121
Mumford *v.* Hodges 131
Maples *v.* Medlin 219
Miller and Roberts *v.* Lucas .. 228
McCrea *v.* Starr 252
Moore *v.* Eagles 302
Mason—*ex parte* 336
Miller *v.* Hunter *et al* 394
McGimpsie *v.* Abner Nash Vail 408
Muir's ex'rs *v.* John Stuart's representatives, &c. 440
McKay *v.* McKay 447

N.

Neil, assignee, &c. *v.* Newbern 133
Nelms & McCulloh assignees, &c. *v.* Pugh 149
Newnan *v.* Newnan 178
Neil's ex'r *v.* Hosmer's ex'r... 202

O.

Thomas Ormond *v.* Kinchen Faircloth 35
—— Overton *v.* Hill 47
—— Oats, trustee of Sampson Co. *v.* Jesse Darden, sheriff, &c. 500

P.

Person's heirs *v.* Davey 115
Pearson *v.* Haden's executors. 140
Peace & Kittrell *v.* Person & Gordon 188
Parker's ex'r *v.* Parker's adm'r 295
Powell *v.* Lyles 348

R.

Raynor *v.* Benthall 279
Rickets *v.* Dickens & Wait... 343
Roberts, indorsee, &c. *v.* Jos. Jones 353
Russell *v.* Presley Hinton..... 468

S.

Elisha Stockstill *v.* John Shuford *et al* 39
Suttrell's ex'rs *v.* Dry's ex'rs.. 94
Simmons *v.* Ratcliff 113
State *v.* Strat 124
—— *v.* Bridges 134
—— *v.* Elizabeth Gray 147
—— *v.* Joseph Street 156
Singleton *v.* Ogden, adm'r, &c. 157
Sweany *v.* Hunter 181
Sawyer *et al. v.* Trueblood's executors 190
State *v.* Smith 213

Sawyer *v.* Hamilton 253
State *v.* Kirby 254
—— *v.* Jones 257
—— *v.* Herndon & Bledsoe ... 269
—— *v.* Groff 270
—— *v.* Sutton 281
—— *v.* Whitsenhunt 287
Sears *et al. v.* West 291
Shaw *et al. v.* Shaw *et al* 334
Slocumb *v.* Newby and Pleas. 413
Smith *v.* Obed Williams 426
State *v.* James English 435
The State *v.* J. Patterson *et al.* 443
Streator *v.* Nathaniel Jones ... 449
State *v.* John Owen 452

T.

Thompson *v.* Tate 97
Turrentine *v.* Murphey 180
Tisdale's ex'rs *v.* Mounger *et al* 290
Tear *v.* John D. White's adm'r 412
Tyler *v.* adm'r of Thomas Person, deceased 498

V.

Vick *et al. v.* Flowers 321
Vervell *v.* John Trexler 438

W.

Elizabeth Wynn *v.* Mishaw Always 38
Walker *v.* Mebane and Rainey 41
Wilcox's heirs *v.* Morris *et al.* 116
Windows *v.* Mitchell 127
Whithead *v.* Clinch's heirs and executors 128
Wilcox *v.* M'Claine, ex'r, &c.. 140
Winaut's heirs *v.* Winaut's devisees 148
Woodfork *v.* Bromfield 187
West *et al. v.* Cocke, adm'r of Bland 191
Warden and sons *v.* Neilson .. 275
Wilkie and wife *v.* West 319
Whitehurst *et al. v.* ex'rs of Enoch Pritchard, dec'd 383
Williams *v.* Henry Branson .. 417
Warren *v.* Alsey High 436
Williams, chairman, &c. *v.* J. Hicks 437
Wardens of the Poor *v.* W. M. Sneed 485
Wingate *v.* the ex'rs of Gibson *et al* 492
Welborn *v.* Nath'l Gordon's administrators 502

Y.

Young, Alston & Co. *v.* Wilder's representatives and devisees 176

CASES

ARGUED AND DETERMINED IN THE

COURT OF CONFERENCE,

OF

NORTH CAROLINA.

DECEMBER TERM, 1804.

SAMUEL HOLDING, Executor, &c., and others, *v.* FREDERIC HOLDING.

In Equity.—Samuel Holding, sen., the testator, on the 9th day of May, 1797, made and published his last will and testament, and therein, amongst other things, devised a tract of land to the defendant, and other tracts to the complainants, Arthur and John Holding, his sons; and directed that the several parcels of land thereby given to his three sons, Frederic, Arthur and John Holding, should be valued by good men, as woodland unimproved, and that the valuation so made, should be kept by them, until after the death of his wife. He further directed, that after the death of his wife, his executors should sell, at twelve months' credit, all his personal estate not before given away, and distribute the money in the following manner, that is to say: Pay the legacies named in the will; and after consulting the appraised value of the lands thereby given to his said three sons, pay unto him or them, as the case might be, such sum or sums of money, so as to make each lot of equal value.

The testator, some time after the execution of the will, with an intention of passing to the said Frederic im-
(10) mediately, all the interest and benefit which he intended him to take under the will, and having in the interim, advanced considerable sums of money to him, by deed, in consideration of affection and twenty shillings, conveyed the lands mentioned in the will, and ten acres more, to Frederic, in fee simple, "*as a portion of testator's estate.*"

The bill charges, that the said conveyance was, at the

time of its execution, understood and intended to be in full and complete satisfaction of all benefit intended to the said Frederic by the will; and that it was understood by the parties, that the said Frederic was to relinquish all further claim on his father's estate by the will or otherwise.

The testator died, his will was proved; the widow died, and the executor sold the personal property bequeathed to her, as directed by the will. The present defendant, some years afterwards, preferred a petition to the County Court of Wake, praying a decree for the deficiency in value between the land devised and conveyed to him as aforesaid, and that devised to each of his brothers, and had a decree to that amount. The complainants prayed for and obtained an injunction.

Mr. L. Henderson, for the defendant, moved to dismiss the bill, on two grounds; 1st, that it prayed for a re-hearing of a cause decided by a competent jurisdiction, from which an appeal lay, either to the Superior Court of Law, or the Court of Equity; 2dly, that it enjoined a judgment rendered by a Court as competent to hear and decide the merits of the cause, as the Court of Equity, without shewing any circumstance of *fraud, surprize or accident.*

BY THE COURT.—No circumstances of *surprize, accident or fraud*, appear to have intervened in this case, to prevent the party from having a full hearing in the County Court, upon the points, which form the ground of the application to the Court of Equity: Of these points, the County Court, (11) upon petition, have *equal and concurrent* jurisdiction with the Court of Equity. The bill is, therefore, dismissed with costs.

WILCOX'S Adm'r *v.* WILKINSON'S Ex'r.

The complainant's intestate filed his bill against the defendant's testator; the object of which was, to set aside an award which had been made between the parties, and to open accounts on which the award was founded; and the court, many years ago, passed an interlocutory decree to that effect. The defendant preferred a petition praying a re-hearing;

which was had, and his petition overruled. The accounts were referred to a Master, who reported a large sum against the defendant. He filed exceptions to the report, which had stood some years for argument, when he preferred a second petition praying a re-hearing of the interlocutory decree. This petition was objected to, on the ground that a second petition praying a re-hearing of the same question, would not lie.

This case was several times argued in the District Court and also in this Court.

BY THE COURT.—The act of Assembly establishing the Courts of Equity in this State, is silent with respect to the mode of proceeding on re-hearing; but in order to ascertain the authority they are to exercise, and the course of procedure in cases not especially provided for, a general reference is made to the former Court of Chancery, and to the power rightfully incident to such a Court.

It would be extremely difficult to discover the rules of practice which formerly obtained here, as well from the total want of any memorials of the decisions of this Court, as from the loss or dispersion of the records.

The practice in England will be found unsuited and inapplicable, in a variety of instances, to the existing constitution of our Courts of Equity, which have therefore
(12) been obliged to make, occasionally, such rules as were necessary to expedite the decision of causes, the details of which the legislature did not enter into, but left to be arranged by the Courts, under the above general reference.

But the shortness of time allotted to the Equity business, and the consequent accumulation of suits in many of the districts, have concurred with other causes, in rendering this branch of our jurisprudence little indebted to precedents of our own, and in compelling a frequent resort to the books, to ascertain the practice in correspondent cases.

Upon the question now under consideration, no aid can be derived from any former decision in our Courts, and it is probable that one of the kind has not before occurred. It must therefore be decided by an enquiry into the usual course of Courts of Chancery, and the powers and authorities rightfully incident to them.

When we consider, however, that Equity is administered in England, in tribunals exclusively established for that pur-

pose, possessing a ready access to all the means of information by which the science is illustrated, by men who make it the principal business of their lives, assisted too, in difficult cases, by the Common law Judges, and from whose decision there is nevertheless an appeal, it seems obvious, that whatever liberality there is in re-hearing causes there, ought more strongly to prevail in our Courts, destitute as they are of all these advantages.

It appears that this cause, so far as it respects the interlocutory decree complained of, has been once re-heard; but that circumstance does not appear, in itself, of such decisive weight as to prevent a re-hearing, more especially, as it must have been at the time re-heard before the same Judges that made the decree. For it is laid down by a great Judge of Equity in England to be the practice there, that when a petition of re-hearing is signed by two counsel, such credit is given by the Court to their opinion, that the cause ought to be re-heard, so as to order it to be set down. Am-
(13) bler's Rep. 91. It is therefore entirely a matter of course to grant a re-hearing, if counsel will certify in its favour. Yet the defendant might have appealed to the Chancellor, if the decree had been made by the Master of the Rolls, or to the House of Lords, if made by the Chancellor. Do not the principles of justice then plainly dictate, that when substantial reasons are shewn against a decree, which when enrolled is final and unappealable, a second re-hearing ought to be granted? It is not a matter of course to grant a second, as it is to grant a first; but whenever the court is satisfied with the reasons offered, it is apprehended that a second ought to be granted. And independently of the additional reasons in support of this mode of proceeding arising from the constitution of our Courts of Equity, there are several cases in the books which, when attentively considered, will go a great way towards authorising it. In the case of Falkland and others against Cheney and others, in 1 Bro. Par. Cas. there was a hearing and re-hearing at the rolls, and upon both occasions the decree was in favour of the defendants, and the petition for the re-hearing was by the plaintiffs. There was afterwards a re-hearing before the Chancellor, who confirmed the decree at the rolls, and after this there was a further re-hearing before the Lord Keeper.

In the case of Porter and Hubert, in 2 Chan. Rep. 85, and 3 Chan. Rep. 78, the decree was made by a Judge sitting for

the Lord Keeper, who afterwards on the petition of the defendant, heard the case himself, assisted by Judges. There was afterwards a second re-hearing before the Chancellor, assisted by Judges.

In the case of Parker and Dee, 2 Chan. Cas., 210, there was a hearing and decree at the rolls, and upon the defendant's appeal, the cause was again heard before the Lord Keeper. On this, another hearing was granted on the plaintiff's petition, upon which the cause was heard by the Chancellor, assisted by a Judge; and the Chancellor making a decree different from both the former decrees, the plaintiffs prayed a still further re-hearing, and obtained it.

(14) These cases, even if there were no others, strongly demonstrate how cautious the Equity Courts in that country are in revising and re-considering decrees, and that before enrolment they are considered within the discretion of the Court to order a re-hearing.

Noel and Robinson, reported in 1 Vernon, 90, 453, 560, 466, also in 2 Chan. Cases and 2 Ventris, is a precedent of a second re-hearing. There were three hearings and two decrees by Lord Nottingham. Lord North re-heard the cause, and reversed Lord Nottingham's decree. But the cause was again re-heard by Lord Jefferies, who reversed Lord North's decree, and affirmed Lord Nottingham's.

So it appears in the case of Nutt *v.* Hill, in 1 Vern., 16, and 2 Chancery Cases, 120, that there were two re-hearings, one before Lord North, the other before Lord Jefferies.

The Court is, therefore, of the opinion, that a petition for re-hearing will lie, notwithstanding a former petition preferred and denied, if the justice of a case demands a re-hearing. They are led to believe, that the justice of the case requires it here, and therefore direct a re-hearing before the Superior Court of Hillsborough District.

Den on demise of STANLEY *v.* TURNER.

From Newbern.

Seven years possession without color of title is no bar to the right of entry.

EJECTMENT.—The Jury found a verdict for the Plaintiff,

subject to the opinion of the Court upon the following case, to-wit:

"The plaintiff and those whose estate he hath, owned the lot mentioned in the declaration, distinguished in the plan of Newbern by the No. 122, extending on Grave street one hundred and seven feet three inches, and back in depth two hundred and fourteen feet six inches. The defendant and those whose estate he hath, owned a lot distinguished (15) by the No. 117, adjoining the plaintiff's on the back end, being of the same width, and extending to another street one hundred and fifty-six feet six inches; both lots lay open and uninclosed, until the year one thousand seven hundred and seventy-six, when the defendant and those whose estate he hath, enclosed his lot with a plank fence, and in the inclosure included sixty feet of that part of the plaintiff's lot, which adjoined his: and the defendant hath kept up the said fence and had an adverse possession of the said sixty feet of the plaintiff's lot in his inclosure ever since."

Upon this case the Jury prayed the advice of the Court "Whether such possession unaccompanied by any other title or Colour of Title, be sufficient to bar an ejectment." If the opinion of the Court be in favour of the plaintiff, they find the defendant Guilty, and assess sixpence damages and sixpence costs; if in favour of the defendant, they find him not guilty.

MACAY, *Judge.*—The question is, Whether an adverse possession for seven years without Colour of Title, bars the right of entry. The law in this case, I had considered as settled, until lately, when it has been alleged that a naked adverse possession, without Colour of Title, does not bar the right of entry.

To investigate this subject, it will be necessary to compare our statute of limitations passed in the year 1715, with the statute of limitations in England, 21 Jac., 1 ch. 16: that it may appear how the decisions upon this latter statute, apply in principle to the Cases affected by our own statute of limitations.

The act of 21 Jac., 1 ch. 16, entitled "an act for limitation of actions, and for avoiding Suits at Law," declares in the first section, "That for quieting men's estates and avoiding Suits at Law, &c. all Writs of Formedon in Descender, Formedon in Remainder, and Formedon in Reverter, at any

time hereafter to be sued or brought, of or for any
(16) Manors, Lands, Tenements, Hereditaments, whereunto any person or persons now hath or have any Title or Cause to pursue, or have any such Writ, shall be sued and taken within twenty years, next after the end of this present session of Parliament; and after the said twenty years expire, no such person or persons, or any of their heirs, shall have or maintain any such Writ, of or for any of the said Manors, Lands, Tenements, or Hereditaments: and that all Writs of Formedon in Descender, Formedon in Remainder and Formedon in Reverter, of any Manors, Lands, Tenements, or other Hereditaments whatsoever, at any time hereafter to be sued, or brought by occasion or means of any Title or Cause hereafter happening, shall be sued and taken within twenty years next after the Title and Cause of action first descended or fallen, and at no time after the said twenty years: and that no person or persons, that now hath any Right or Title of Entry into any Manors, Lands, Tenements, or Hereditaments, now held for him or them, shall thereinto enter, but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other Title of Entry accrued: and that no person or persons shall at any time hereafter make any entry into any Lands, Tenements, or Hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same: and in default thereof such person so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former laws or statutes to the contrary notwithstanding."

And in the second section the statute declares, "Provided nevertheless, that if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be, at the time of the said right or title first descended, accrued, come or fallen, within the age of one and twenty years, feme covert, non compos mentis, imprisoned, or beyond the seas, that then such
(17) person and persons, and his and their heir and heirs shall or may, notwithstanding the said twenty years expired, bring his action or make his entry as he might have done before this act, so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlarge-

ment out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years."

Our statute of limitations passed in 1715, ch. 27, entitled "an act concerning old titles of lands, and for limitation of actions, and for avoiding Suits in Law," declares,

"Sec. I. Whereas Suits, debate and controversy, hath heretofore been, and may hereafter arise by means of ancient titles to land derived from patents granted by the Governor of Virginia, the conditions of which patents have not been performed, nor quit-rents paid, or the lands have been deserted by the first patentees, or for or by reason or means of former entries or patents granted in this Government; for prevention whereof, and for quieting men's estates, and for avoiding Suits in Law.

"Sec. II. Be it enacted, &c., that all possessions of or titles to any Lands, Tenements or Hereditaments whatsoever, derived from any sales made, either by creditors, executors or administrators, of any person deceased, or by husbands and their wives, or husbands in right of their wives, or by endorsement of patents or otherwise, of which the purchaser or possessor, or any claiming under them, have continued, or shall continue in possession of the same for the space of seven years, without any Suit in Law, be and are hereby ratified, confirmed, and declared good and legal to all intents and purposes whatsoever, against all and all manner of persons, any former or other title or claim, act, law, usage or statute to the contrary notwithstanding.

"Sec. III. That no person or persons, nor their
(18) heirs, which hereafter shall have any right or title, to any Lands, Tenements or Hereditaments, shall thereunto enter or make claim, but within seven years next after his, her or their right or title, which shall descend or accrue: and in default thereof, such person or persons so not entering or making default, shall be utterly excluded and disabled from any entry or claim thereof to be made.

"Sec. IV. Provided nevertheless, that if any person or persons that is, or hereafter shall be entitled to any right or claim of Lands, Tenements, or Hereditaments, shall be, at the time the said right or title first descended, accrued, come or fallen, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond seas, that then such person or persons shall and may, notwithstanding the said

seven years be expired, commence his, her or their suit, or make his, her or their entry, as he, she or they might have done before this act; so as such person or persons shall within three years next after full age, discoverture, coming of sound mind, enlargement out of prison, or persons beyond seas, within eight years after the title or claim becomes due, take benefit and sue for the same, and at no time after the times or limitations herein specified: but that all possessions held without suing such claim as aforesaid shall be a perpetual bar against all and all manner of persons whatsoever, that the expectation of heirs may not in a short time leave much Land unpossessed, and titles so perplexed, that no man will know of whom to take or buy Land."

Under the statute of 24 Jac. 1, it has been held, "that no person can in any case bring an Ejectment, unless he has in himself a right of entry; for as he is supposed to have entered with a good title on the Land and made a good lease to the fictitious lessee, the law will not suppose an entry made to make a lease whereby the title is to be tried. Esp. 430. 3 Bla. 206. Therefore when it happens that the person claiming title to the Lands, has no right of Entry, he cannot maintain this action." But though, a good and
(19) lawful title may in fact subsist in the plaintiff, yet he may be barred of his entry, and so of his recovering by this action, under the 21 Jac. 1 ch. 16, which enacts that no person shall make an entry into Lands, &c. but within twenty years after his right and title shall accrue, with the usual savings of Feme Coverts, infants and persons insane, &c." "Therefore if the lessor of the plaintiff is not able to prove himself or his ancestors to have been in possession within twenty years before the action brought, he shall be non-suited."

"The possession or entry of the lessor of the plaintiff within twenty years, which is necessary to give him title, must be an actual possession or entry, not a presumptive or implied one. Esp 432. So that the twenty years possession, which is sufficient to bar the Ejectment or to give a title, must be an adverse possession; for when it appears not to be adverse, the statute of limitation does not run." Id. 433. In the case of Reading *v.* Royster (2 Salk. 423), this doctrine is more fully explained. Also in Cowp. 217: It is to be submitted to the Jury to say what is an adverse possession. It is not necessary that a man should be expelled from his pos-

session with force: The getting of possession lawfully, but afterwards holding against the will of the owner, will amount to an adverse possession.—Proof of possession within twenty years is not only necessary to support the title of the lessor of the plaintiff; but such possession for twenty years without interruption is a good title in itself, to recover in Ejectment, without any other: For an uninterrupted possession for twenty years is like a descent which tolls an entry, and gives a right of possession, which is sufficient in Ejectment: So that, though the defendant be the person who has the legal right to the premises, yet he cannot justify ejecting the plaintiff, who has had twenty years previous peaceable possession.

Let us now examine how much stronger is our statute of limitations in favour of a naked possession, if the expression be allowable.—It appears from the preamble of
(20) the act, that it had been the practice of the Governor of Virginia to grant lands lying in North Carolina, which grants oftentimes covered lands granted by this Government, and possessions being held under such Grants, titles to lands became so doubtful, that no person knew when he was safe in purchasing. It was highly necessary to encourage the settlement of the country, which could not be done unless men could be secured in their possessions, which they then had or might afterwards acquire. This act was passed to effect this object. Taking this act as it regards possessions only, it will read and be construed in this manner: "That all possessions of Lands, Tenements and Hereditaments whatsoever, derived from any sales made by creditors, executors or administrators of any person deceased, or by husbands and their wives, or husbands in right of their wives, or by indorsement of patents, or otherwise, of which the possessor, or any claiming under him, have continued, or shall continue in possession of the same, for the space of seven years without any Suit in Law, shall be and are hereby ratified, confirmed and declared good and legal to all intents and purposes whatsoever, any former title or claim, act, law, usage or statute in any wise notwithstanding." The act would have the same reading with respect to titles made by creditors, executors, &c. and have the same construction. But this act has an expression which seems to guard every possible case, "*or otherwise*," so that the possession for seven years, no matter how acquired, would be a good title, unless

the law would look upon and consider that possession, the possession of both, or in other words, the defendant holding the possession for the lessor of the plaintiff.

In no part of this act is the color of title mentioned, nor does it appear that it ever was deemed necessary. It has been said that a title to lands, defective in itself, but attended with seven years of peaceable possession, shall ripen into a good title; but if the title be ever so old, and seven years of peaceable possession have not accompanied it, the
(21) title is good for nothing. Then the possession makes the title valid. Why then should not the seven years possession be good? It is surely the substantial part of the title, and that which gives it validity, under the statute of 21 Jac. 1, and in my opinion it does the same under our own statute: I have understood it was so considered before the revolution of 1776, but of this I have no knowledge, except from the old practitioners.

But admitting the second section has no relation to the present question, the third section makes it absolutely necessary that every person shall enter or make his claim within seven years, after his right or title shall descend or accrue, otherwise he shall be utterly excluded and disabled from any entry or claim thereafter to be made. In the latter part of the proviso, "But that all possessions held without suing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatsoever, that the expectation of heirs may not in a short time, leave much land unpossessed, and titles so perplexed, that no man will know from whom to take or buy land," in my opinion clearly establishes that the General Assembly had only a possession in contemplation, and that possession unattended with any color of title whatever. Giving our act of assembly this construction, all the cases on this point arising on the statute of 21 Jac. 1, apply to our act of limitations; and seven years adverse possession will vest in the lessor of the plaintiff such title, that if he should be turned out of possession, or deprived of his possession, he could recover the same in Ejectment. I am therefore of opinion the plaintiff ought not to recover.—But by

TAYLOR, HALL AND LOCKE—*Judges.*—Seven years posses-

sion without color of title, is not sufficient to bar the plaintiff in Ejectment. (a)

(a) When this case was argued and submitted, JOHNSON—*Judge*—was on the bench, and before he resigned his seat, he drew up the following opinion, which was filed with the clerk of the court:

JOHNSON—*Judge.*—The act of 1715, ch. 27, has two (22) objects in view, as appears from its title. The first , is, to cure defective titles, after a possession of seven years; and for this purpose the second section enacts, that *all possessions or titles*, &c., derived from any *sales* made, &c., where the purchaser, &c., have continued, or shall continue in possession seven years, without, &c., shall be declared good, &c. The words of the act being *possessions or titles*, in the disjunctive, if *by title* is intended *conveyance*, perhaps a seven years possession under a sale without a conveyance, might be held a good title under this act; and extend so far as to bar not only an ejectment, but a writ of right also.

The case in question comes under the third section, which provides for the second object of the act, *Limitation of Actions.* It takes away the entry or claim within seven years after the right accrues: it says nothing of *sales or title:* it seems intended to extend further and embrace cases not within the provision of the second section, and is surely a copy of the statue of 21. Jac. 1, ch. 16. The only difference which I have been able to discover, is, that the word "*claim*" is inserted in our act of assembly, but is not to be found in the statute. This section, therefore, of the act of assembly may very well be construed by the rules laid down in decisions on that statute, which was certainly in force in this country at the time of making the act, as our charter does not bear date until many years after the 21 Jac. 1; and it has been uniformly held under this statute, that a naked possession of twenty years will bar an ejectment. Bac. Abr. under the title *Limitation of Actions*, Vin. Abr. *Limitation*, Jenk. 16, pl. 28, 3 Com. Dig. Ejectment A. And it is laid down in 2 Salk. 421, that a man may recover in ejectment on shewing a possession of twenty years, and that he was afterwards ejected. It therefore appears to me, that a possession of seven years without any actual *sale or conveyance*, will bar an entry, and is a good title in ejectment under our act of assembly. (b)

(b) The reasoning which determined a majority of the Judges to the

opinion "that seven years possession without color of title will not bar an ejectment," will be found in the following observations of John Haywood, Esq., late one of the Judges of the Superior Courts of Law and Courts of Equity in this State. The case of Armour *v.* White, tried before his Honor Alfred Moore, Esq., at Edenton, in April, 1799, gave rise to these observations. In that case Thomas Stanton, being seized of a tract of Land, conveyed an hundred acres thereof to William Armour, from whom the same descended to the lessor of the plaintiff, who in 1768, removed to South Carolina and never made any claim after his removal until a little time before the commencement of this suit. The defendant also claimed under Stanton, who in 1714 having assigned to Gutherie, the land comprised in a certain plat. Gutherie ob-

(23) tained a patent for the same in 1716. This patent was for one hundred and ten acres, the lines of which included part of the hundred acres in dispute; and under this patent the defendant claimed the whole hundred acres. He and those under whom he claimed, had possessed a part of the hundred acres upwards of forty years: They had cleared and cultivated part of an adjoining tract and extended their clearing and cultivation over a small part of the hundred acres lying within the limits of Gutherie's patent; and the defendant proved by several old deeds for lands adjoining that part of the hundred acres which was not included in Gutherie's patent, that the lines of the hundred acre tract on that side, were reputed the lines of those under whom he claimed—MOORE—*Justice*—The possession of part of a tract circumscribed by marked lines, is a possession of the whole tract within these lines. If the defendant and those under whom he claims, possessed the part mentioned in the evidence, claiming under Gutherie's patent their possession extends to the lines of that patent and no further: But if they possessed this part claiming as far as the lines of the hundred acre tract, then their possession extends to the whole tract. "A naked possession for seven years, without entry or claims, will bar the right of entry of all adverse claimants; and a possession with a color of title for seven years, will give to the defendant in possession an absolute right against all others forever."

This distinction, observes Mr. Haywood, between a seven years naked possession, and a seven years possession with color of title, is, as I apprehend founded upon a wrong construction of the act of limitations. It supposes the second section was intended to operate upon future cases in such manner as to give a right to the defendant; and that the third section was intended to operate, by tolling the plaintiff's entry, or taking away his rightful possession, so as to disable him from recovering in ejectment, without affecting the property or mere right, which he may recover in a writ of right. I shall attempt to shew that this construction is erroneous, and to point out the genuine and true meaning of the act; it being of very great importance to the public, that this act should not be misunderstood.

First, then, as to the second clause: It was passed in the year 1715, prior to which period no office for the registration of deeds and mesne conveyances had been established; consequently bargains and sales were not used in this country, for they were void unless enrolled within six months. The act of 1715, ch. 28, first established these offices. Fines and recoveries were not in use: That is declared in the preamble of the act of 1715, ch. 28: Feoffments or livery and seisin are spoken of in the sixth section of 1715, ch. 38, as a mode of conveyance practised in Great Britain, implying that it was not in this country. There is no vestige upon the records of any court to shew, it ever was practised in this country prior to 1715. There could not have been then any certain

known mode of conveyance, by which one individual could convey lands to another: and this difficulty we may readily suppose was rendered not the less perplexing by the illiterateness of the first settlers. All, or the greater part of the conveyances which had been made, must have been liable to be invalidated, for want of legal forms and solemnities. We learn from the act itself that the creditors had sold or caused to be sold the lands of their debtors: Though there was no law for the sale of debtor's lands until 5th Geo. 2 ch. 7, in the year 1732. Executors and administrators had sold lands, which no law justified: husbands and wives had sold the lands of the wives, which was ille-
(24) gal before the act of 1715, ch. 28: or husbands had sold the lands of their wives, for which there never was any law; and sometimes, patentees knowing of no better mode, had conveyed by endorsement of patents, or by some other similar means. All such conveyances were invalid; every possessor under such titles was liable to be ousted. Under such circumstances the country must necessarily have been in a state of great inquietude. There existed two great evils, demanding the interposition of the legislature; first, the want of a certain established mode of conveyance: secondly, a confirmation of the titles thus irregularly obtained. The first, they remedied at this session, by the two acts of 1715, ch. 28, entitled, "Feme Coverts, how to pass lands;" and 1715, ch. 38, entitled " an act to direct the method to be observed in conveying lands, &c." The latter they provided for, by the clause now under consideration. All possessions of, or titles to any lands derived (not which shall be derived) from any sales made, either by creditors or administrators of any person deceased; or by husbands and their wives, or husbands in right of their wives, or by endorsement of patents or otherwise, of which the purchaser or possessor or any claiming under them, have continued or shall continue in possession of the same for seven years, without any suit in law, be and are hereby ratified, confirmed and declared good and legal to all intents and purposes whatsoever, against all and every manner of persons, &c. Here is not any exception in favour of infants, Feme Coverts, &c. When speaking of titles, it mentions them in the perfect tense, " derived," equivalent to " already derived;" because such only were the titles they intended to ratify. But considering that some such titles had been derived within seven years next before that session, and would not be ratified for want of a seven years possession, unless provision were made for them, when they came to speak of that, they use both the perfect and future tense, " have continued, or shall continue;" the former relating to titles made more than or as long as seven years before; the latter to titles derived within seven years before, but which were equally with the others to be ratified, provided a seven years possession should be completed, though part of it might be after the act. They speak of them as invalid titles, (though many of them, such as those by endorsement of patents and by husbands and wives, came from those who actually had the title and were certainly good unless for want of legal form) which shall be ratified and declared good and legal; importing that they were not so but for the act. Now the General Assembly could not mean to ratify and confirm such illegal conveyances if made afterwards; for an order to prevent the like inconveniences and inquietudes for the future, they at this session declared how lands shall be conveyed: and moreover that no conveyance shall be good, unless acknowledged or proved and registered. Shall all such unproved, unacknowledged and unregistered titles as those mentioned in the second clause, and which are here expressly prohibited, be still continued and still practised and confirmed? Did they suppose, notwithstanding the act pointing out and ascertaining the

legal method of conveyance, that the irregular methods mentioned in the second clause would still be used? The contrary is certainly evident. They could not have supposed that after this session, the people of this country would so generally disregard the mode prescribed, as to make it expedient beforehand, to provide for such irregularities; and therefore, the second clause must have been made with a retrospective view. Again, there is no exception in this clause in favor of Feme Coverts, &c. But the titles here spoken of, are to be confirmed and declared good and legal, against all and all manners of persons. The object of the legislature, that of quieting the country with respect to all existing causes of uneasiness, require (25) that no exception should be made; for then Feme Coverts, infants and the heirs of such, might still be a cause of apprehension to great numbers of settlers, and the remedy would be partial and incomplete: Whereas, they intended an effectual and complete one, which in three or four years should put all things in quietness. Therefore the exception was designedly omitted out of this clause, and the strong expression "all and all manner of persons," inserted, though that exception is made in the third clause. Now to try the effect of the second clause; let it be admitted, that it has an operation upon future cases; and suppose a husband has conveyed the land of the wife since the act; and that the possessor has continued seven years in peaceable possession, the wife being alive all the time: will such a possessor have a good right forever, against all and all manner of persons, the Feme Covert not excepted: although in the exception to the third section, her title is saved to her, till after the coverture? Either the possessor will not have a title under the second clause, or the Feme Covert will lose hers, though saved by the fourth; or the repugnance must be avoided, by giving to the second clause a retrospective and not a future operation, in which case the whole is consistent.—Again; Let us suppose that the husband and wife, since the act, have joined in a conveyance of the wife's lands, as directed by 1715, ch. 28: would not such conveyance be good without the aid of the act of limitations? And would it not follow, that the legislature were occupied to no purpose, when busied in declaring that such conveyance should be confirmed, when or after the lands should have been possessed for the space of seven years? And as such a conveyance, before the act, did really stand in need of assistance, *aliunde* is it not fair to conclude the clause in question respected such a conveyance made before the act, but not such a one when made after it? It may be further observed, that if by this clause the defendant's title be ratified forever as to future cases, it is a perpetual bar to the plaintiff; and then if it can be shewn as to future cases that the third clause operates also as a bar to the plaintiff, it follows, either that both clauses are for the same purpose, (which cannot be imagined) or that the second regards past transactions, whilst the third and fourth regard future ones; and it will also follow, that the second bars perpetually, when there is possession with colour of title: and the third bars by possession without colour, as the opinion, I am controverting, supposes; that either the second is useless; (for why require colour of title, when the next clause dispenses with it altogether, and forms a complete bar without it, producing the very same effects without as the former does with it;) or, that the second respects past transactions only. Now, what say the third and fourth clauses? No person shall enter or make claim but within seven years, and in default shall be disabled from any claim thereafter to be made, except Feme Coverts, &c. who have a longer time allowed: "But that all such possessions, without suing such claim as aforesaid, shall be a perpetual bar, &c." If a naked possession, as the opinion supposes, under

these clauses, will work a bar, is not that bar, however operated, a perpetual one? And admitting the plaintiff to be perpetually barred, the defendant's title is perpetually confirmed; and then the third and fourth clauses, without any colour of title, operate the same effects precisely, as the second clause with colour of title, and consequently the second was never of any use, unless it related to titles before the act; which if it did, it was as beneficial and as useful a clause as any in the act. These considerations seem to me to prove, that the second clause has not a prospective view, and that with regard to it as relating to cases after the act, it is erroneous to say a colour of title with seven years' possession will give a right in Fee. For though a colour of title with seven
(26) years' possession does, as I contend, really have that operation, it is not by reason of anything contained within the second clause, but arises from the true construction of the third and fourth clauses. I think it may therefore be fairly concluded, that the latter member of the above distinction, as founded on this clause, is not warranted by it.

And this brings us to the other part of the distinction, namely, that a naked possession for seven years tolls the right of entry of the plaintiff, and bars his ejectment, but not his writ of right. This is a construction upon the third and fourth clauses, and I shall endeavor to shew that it is equally erroneous with the other.—In addition to controversies arising from informal conveyances, there were others of a different complexion; conveyances made or to be made, by persons having no title, though seeming to have one, or being understood to have it. Before the extension of the boundary line between Carolina and Virginia, lands supposed to lie in Virginia, had been granted by the Governors thereof, and had been neglected and deserted by the patentees, and had been again granted by the lords proprietors: Entries of lands had been made in the Land Office, and the same lands were afterwards entered by others. All this appears in the preamble of the act; and by such means (as another part of the act complains of) titles had become so perplexed, that no one knew of whom to take or buy lands. If he purchased from a patentee or grantee under him, an elder title might be produced and he be turned out of possession. Thus it happened, as the act also complains, that the dread of elder titles and the expectation of heirs, under dormant deeds and grants, were "likely in a short time to leave much land unpossessed." It was necessary to remove these obstacles to population, and to that end, to provide some criterion by which a man might know of whom to buy lands, notwithstanding the several conflicting grants or deeds for the same; and to ensure him of security, notwithstanding there might be unknown prior grants to that under which he purchased. Every instance given either in the preamble or body of the act, evinces an intention to settle disputes between claimants under opposite deeds or grants for the same land. Ancient titles to lands granted by the Governor of Virginia, were likely to disturb those who had obtained titles here, (for I understand such grants were legalised by compact between the King and the Lords proprietors); or the lands had been deserted by the first patentees and a latter patentee had taken possession; or former entries or patents threatened the titles or possessions under latter entries or patents, and proves that the person to be protected by the provisions of the act, was one who had an appearance or colour of title by a subsequent deed or grant, as well as the person to be barred. Such were the evils to be remedied, and such the design of the legislature: And they have applied the remedy in the following words: "No person nor persons nor their heirs, who hereafter shall have any right or title to any lands, tenements or hereditaments, shall enter thereunto, or make claim, but within seven years next after his, her, or their right or title which shall descend or accrue: and in

default thereof, such person or persons so not entering or making default, shall be utterly excluded and disabled from any entry or claim thereafter to be made. If any person that is or shall be entitled to any right or claim of lands, tenements or hereditaments, shall be at the time the said right or title first descended or accrued, come or fallen, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond seas, that then such person or persons shall and may notwithstanding the said seven years be expired, commence his, her or their suit, or make his, her or their entry, as he, she or they might have done
(27) before this act; so as such person or persons shall within three years next after full age, discoverture, coming of sound mind, enlargement out of prison, or persons beyond seas within eight years after the title or claim becomes due, take benefit and sue for the same; and at no time after the times and limitations herein specified: But that all possessions held without sueing such claim as aforesaid, shall be a perpetual bar against all and all manner of persons whatsoever; that the expectation of heirs may not in a short time leave much land unpossessed, and titles so perplexed, that no man will know of whom to take or buy lands." Upon these clauses, the opinion in the case of Armour and White admits, that an adverse possession is necessary, for this is implied in the words "enter or claim," each of which technically signifies a getting of the legal possession from one who is actually in possession, either by going upon the land, or claiming as near to it as he dare go, for fear of the possessor: and is unequivocally expressed in the exception to the third clause, "but that all possessions held without suing such claim as aforesaid," &c. referring to the terms used in the third clause, and signifying the understanding of the legislature to be, that such claims as are spoken of in the third clause, were to be exerted within the limited time against some actual possession. So far, the opinion is right; for it would be absurd to say a good title shall be barred by not entering within seven years, when no adverse claim or possession hath been set up. But whence is it inferred that these claims bar the right of entry only? The policy of the act was, that settlers should know of whom to purchase with safety: not a temporary title, capable of resisting an ejectment only; but a permanent one, capable of encouraging to clear, cultivate, and improve the lands, and such as they might transmit to posterity: and answerable to this policy, the possession here spoken of "shall utterly exclude and disable," the party out of possession from any entry or claim thereafter to be made. And for fear these words were not sufficiently expressive, it is added that all such possessions shall be a perpetual bar to all persons &c. It might possibly have been understood from the wording of the former clause, "shall be utterly excluded from any entry or claim thereafter to be made," that the legislature meant only to prevent the entry or the action founded upon the right of possession leaving the property or mere right unaffected, and to obviate such a mistake, they have in the next clause carefully varied the expression, "shall be a perpetual bar to all and all manner of persons;" not only the claim and entry, but all persons shall be barred. Of what? Not of any particular action or means of getting possession, but generally and perpetually—Again: Feme coverts and the like persons, "shall sue" within the time limited for them, "and at no time afterwards:" can it be meant that they shall never sue nor have any action whatsoever afterwards, and that all others may sue after the time limited for them, in a writ of right! When their disabilities are removed, they stand in the view of reason and justice, in the same predicament as other claimants—certainly in no worse; they are not more in fault for not suing within the prescribed time, than other claimants, yet they shall never bring any action afterwards: they are

excluded from the privilege of suing, for ever; and consequently so also must all others be, unless a sufficient reason can be assigned for placing these favored persons on a worse footing than others. Supposing this to be law, it were far better for them that the exception intended to benefit them had not been made: For then after the seven years were expired, they might still sue a writ of right within sixty years, as the opinion supposes others may. Since, then, the bar formed by these clauses, is a *perpetual* bar against all *claims*, all *entries*, all *persons*, and all *suits;* it takes from the plaintiff all remedy, and consequently all title and
(28) right, and vests in the defendant, necessarily, the absolute dominion for ever; or in the language of the law, an indefeasible fee simple. And as this accomplishes the object of the legislature, which was to quiet possessions, and to furnish the means of knowing with certainty from whom out of many claimants to purchase or buy lands with safety; and as that object would not be accomplished, were the bar only temporary and the title still liable to be questioned in a writ of right, it seems to me that there can be little or no doubt, but that is the true operation of the act, and of course that it is a mistake to say, it bars the right of entry only. This reasoning is confirmed by the fact that there is no instance to be found in the judicial records of this country, where a writ of right was ever instituted and maintained. If it were a sound position that the bar is but temporary, there must have been a great number of occasions rendering the use of that writ essential to the recovery of lands, the right of possession to which had been lost, though not the right of property: and there not being a single instance since the year 1715, is strong evidence to prove that it cannot be used, and that the exposition given by our ancestors, who were co-temporary with the first operations of the act, was, that the clauses in question operated a perpetual bar. Upon no other ground can it be accounted for that the writ of right was never used: and indeed no reason can be assigned why the legislature should desire that the plaintiff should be barred of his ejectment, but at the same time be able to recover in a writ of right. What motive could they have? How would that have promoted the design which influenced them in passing the act? Their design was to do away the obstacles which opposed the settlement of the country. These were, the uncertainty and perplexed situation of titles and the expectation of heirs under former grants. Was it promotive of this design that the possession introduced by the act should not render the title complete to all purposes, but should leave the possession as much exposed to those heirs and their actions as before? And those who purchased under such possessions, no more certainty of an indefeasible title than before? I forbear to say any thing of the nature and form of a writ of right, and of those by whom it is to be used, and of other circumstances incident to it; it is sufficient for my present purpose to be enabled to discover no substantial reason for preferring a recovery under that writ, to a recovery in the action of ejectment, and it appears clear to me that such a distinction could not have been intended for any purpose, and therefore that it was not intended at all.

That a naked possession will operate the bar spoken of in the third and fourth clauses is as unfounded as the rest of the position. The remarks already made upon the causes of passing the act, shew that it was made to settle disputes among claimants under different grants for the same lands, and with that view only. This is the very reason why it never extended to the Lords proprietors, so as to bar them by a naked possession of their lands; as it would have done (they being equally subjects with the settlers of the country,) had it reached the case of disputes arising upon possessions unaccompanied with deeds or grants, or *naked*

possessions. In the times preceding the act none pretended to hold lands by possession against a title by a deed or grant: nor was it conceived that possession could either make or bar a title. How could it, when no law existed for that purpose? The 21 Jac. 1. ch. 16. was not in force, nor indeed any statute made after the fourth year of his reign in the year 1607: That being the æra of the settlement of the country legally authorised and continued. For want of such a property inherent in possession naturally, the act was passed to give it that property in certain instances and under certain restrictions. Before this period
(29) no disputes were known between claimants by grant on the one hand, and bare possession on the other. The law of those days rendered the grantee's title incontestible, when opposed by an adverse naked possession: no danger was to be apprehended in purchasing from such a grantee on account of the adverse possession. It is impossible in the nature of things that the act could have had for its object any disputes of that nature, which had not then been known or heard of, nor were foreseen. The idea of title by naked possession arose after the act, and originated in a misconception of its meaning; and has become a new source of litigation unknown to former times and not anticipated by the framers of the act. The claiming of lands by a naked possession against a title by a deed or grant, has encouraged those having no title, colorable or otherwise, to settle upon the lands of others, and commit trespasses, with a view of acquiring a title by a continuation of such trespasses for seven years together; and has made men believe, that actions must be instituted against such trespasses to prevent the acquisition of title. Thus an act which breathes the spirit of peace and quietness, which flowed from the solicitude to prevent law suits as far as possible, and to remove the causes which perplexed men's titles, has been made the disturber of repose, the mother of inquietude, the stirrer up of controversies, and a net to entangle men's titles. Instead of discountenancing attempts to get lands by unfair means, without purchasing from the Lords Proprietors, or from those who have purchased from them; instead of repressing any practice of settling upon the lands of an honest purchaser, knowing that the settler commits a trespass in doing so, and the land belongs to another and not to himself, it is made to encourage and to cherish such attempts and practices. We may perceive the soundest policy and justice in protecting the possessions and confirming the titles of those who have paid for their lands, obtained grants and deeds, and settled down upon them, and who have cleared, cultivated and improved them for seven years together, believing them to be their own; and who in all that time have received no information from a prior grantee or those standing in his place; of their better title: But we can perceive no motive for extending the same protection to a naked possessor or trespasser. A design of that kind is not to be inferred either from the nature of those controversies which existed prior to the act, the causes which gave birth to the act, or from any of the terms employed by it to signify its meaning, when compared with and explained by other parts; and therefore there is no ground to believe it to have actuated the makers in any degree: The less so, as the immediate consequences of the doctrine, the incompetency of the ejectment but the competency of the writ of right after the seven years, fabricate an arbitrary distinction, unfounded when applied to our circumstances, in any principle of convenience, policy or justice. For with respect to the intention, why not recover in the ejectment after the seven years as well as in the writ of right? A distinction which has never been recognized by the practice of those who have gone before us, has never been found necessary to be admitted as a part of our law prior to the year 1715, to

the year 1799, during all which time the landed interests and rights of the people have been satisfactorily secured and protected, without the aid of the writ of right.

Innovations in law, like innovations in government, are dangerous experiments, since the extent of their influence cannot be foreseen. And it is now much to be doubted, since the act of 1778, ch. 5, whether, supposing a writ of right to be necessary, it can be deemed a part of the law of this State. From the foregoing remarks, admitting them to be just, it is to be collected, that the second section of the act of
(30) limitations regards irregular, invalid and informal conveyances, made before the act passed: That the third and fourth sections relate to cases, where several persons have deeds or grants perfect enough in form for the same tract of land, and some of these persons under deeds or grants of a posterior date, take and continue the possession for a considerable length of time; and that the true meaning and operation of the latter clauses, are, to confirm forever the title of all such persons having a color of title, who may continue in possession under such title, for seven years, without entry or suit in law, except as against persons laboring under incapacities mentioned in the fourth clause; and as against them also, if they shall not sue within the time limited after the disabilities shall be removed, but not to create any title *de novo*, upon the ground of possession or otherwise. (a)

(a) The foregoing observations of Mr. Haywood have had the effect of changing the current of decisions and unsettling the opinions of the profession as to the construction of the act of limitations; and at the distance of an hundred years from the passage of this act, more diversity of opinion seems to exist as to its true meaning and operation than at any preceding period; and perhaps nothing short of legislative interference will remove difficulties, which present themselves in any view which has been taken of this act. It may be doubted, whether in the present condition of the country, whilst men claim title to large tracts of land and have the actual possession of only a small part thereof, and when the lines of those tracts are neither distinctly marked nor generally known, it be practicable to establish any rule upon the subject which will not be liable to abuse and attended with inconvenience.

Upon general principles, regardless of the phraseology of the act of limitations, a possession, which is to bar one man of his right and vest that right in another, ought, 1st, to be an honest possession, or at least honestly acquired; 2ndly, the extent of the claim of the possessor ought to be ascertained and notorious: and 3dly, the possession should be continued for such time as would raise a violent presumption that no adverse claim exists: and it is fair to presume, the legislature intended that the possession under the act of 1715, should be of this character. The Legislature could not have intended to protect fraudulent possessions, nor possessions evidencing no certain extent of claim. It would seem strange that the law, which searches fraud in all its recesses and delights in expelling it wheresoever else it can be found, should in cases of possession spread over it the mantle of protection; and it would seem equally strange that the law should give any operation to a possession, which does not furnish to the world any evidence of the extent of the possessor's claim; to a possession which gives no notice whether the possessor claims five hundred or a thousand acres. In England (and it may be the case in this country an hundred years hence) little inconvenience exists upon this point: The extent of every possessor's claim is notorious. But here it often happens that a man settles down upon a tract of land without making known the boundaries to which he claims, and he subse-

quently sets up a claim to suit his convenience. This evil seems to have determined the judges to the opinion (so far as that opinion was founded upon reasons of policy,) that colour of title was necessary to give operation to a seven years' possession. The experience of several years has rendered it very questionable, whether there was not more policy in the rule formerly enforced, "That seven years possession, with a claim to known and marked boundaries should be operative to bar the (31) entry of adverse claimants." For under this rule, to enable a man to ripen his possession into a title, it became necessary for him to have known and marked lines or natural boundaries, and to make known his claim to those lines or boundaries for the space of seven years together—Whereas under the present rule, a man may settle down upon a tract of land under colour of title and claim to the boundaries called for in his title, without even knowing where those boundaries are. A beginning corner is marked, and the lines of his land have not been surveyed: a plat of the lines is made out by the surveyor and the deed written from the plat. This rule substitutes the colour of title, and the place of "the claim to known and marked lines or natural boundaries" required by the former rule. Which rule best ascertains the extent of the possessor's claim? The possessor with colour of title is supposed to claim to the lines called for in his deed; but the rule now enforced does not require the possessor to make out those lines, nor to make his claim to them notorious; nor even to register his deed, that others may be informed what lines are called for in it. What is the consequence? A man having a deed for a large tract of land settles down upon one corner of it and resides there for seven years; during all which time he neither has his land surveyed, the lines marked, nor his deed registered: at the end of seven years he registers his deed, has his land surveyed, and the lines are found to include one-half of an adjoining tract for which his neighbor has an elder deed, but not the actual possession; and upon the principle that the possession of part is the possession of the whole tract covered by his deed, he gets his neighbor's land without having given to him or to any other person notice that he had a claim to it. The rule requiring colour of title is thus made to work the most manifest injustice, and become a most convenient means of effecting fraud. It surely then is an object worthy of further judicial enquiry, whether there be anything in the act of 1715, imperatively demanding colour of title to give effect to a seven years' possession; and if there be not, whether the interest of the community will not be consulted by reviving and enforcing the former rule, and enlarging its operation, by permitting the man against whom the seven years possession is set up, to defeat this possession, by shewing that it had been fraudulently acquired; that the possessor knew at the time he acquired possession, the title was in some other person; in other words, that he had such notice as was sufficient to put him upon an enquiry as to the title of the true owner.

The statute of 21 Jac. 1, ch. 16. had been in operation for more than a century when the act of 1715, was passed: Its construction had been settled; and if it be admitted that it was not in force in this state, it cannot be denied that its construction was well known to the framers of the act of 1715. They knew that under that statute, the courts had uniformly held that twenty years naked possession barred the entry of adverse claimants, except of those laboring under the disabilities enumerated in the statute. When therefore they drew the third and fourth clauses of the act of 1715, (which were to operate upon future cases) in the same words, to every substantial purpose, with the statute of 21 Jac. 1, they must have intended that those clauses should receive the same construction with the like clauses in that statute. The earliest accounts

which have been transmitted to us of the construction which the courts in this state gave to this act, inform us that they had adopted the construction which had been given to the statute of 21 Jac. 1, upon this point. The construction continued to be given to the act for more than twenty years after the American revolution, when the doctrine colour of title was advanced, which being urged with much zeal and ability, gained converts, until it supplanted the construction, which the act had received for nearly a century. It is not intended to discuss this point at length; but to invite further attention to it, that something more may be done by the proper tribunals, "to quiet men in their possessions, and to avoid suits in law."

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(32) JAMES CRITCHER *v.* WILLIAM PANNELL.

The plaintiff and one George Parker, on the 24th day of December, 1799, by articles under their hands and seals, agreed to run a horse race, one quarter of a mile, on the first Thursday in May, 1800, on Rice's path: Parker's nag to carry one hundred and forty-five pounds, and Critcher's nag *one hundred and thirty pounds;* for five hundred dollars, to be staked on the day of the race, in cash, good property or bonds; the nags to be turned thirty feet from the starting poles, and to turn and *run the first time locked and* judge the difference.

The parties met at the time and place stipulated, staked their bonds in the hands of the defendant, and weighed their riders, according to the terms of the articles. They then attempted to start the nags, and made many attempts to do so without success; Parker's nag being very restive and ungovernable, and refusing to start from a standing position, (as it had usually done before on like occasions) but would have started readily if walked down the paths: Critcher's nag was easily managed, and would have run off without difficulty if walked down the paths with Parker's: this he refused to do, or to make any other effort to lock the other nag, further than by placing his own in a proper situation to be locked, which he frequently did; but always when the other was standing. The plaintiff in the evening run his nag over the ground without being locked, demanded the stakes, and brought this action of detinue to recover them.

On the trial the defendant offered testimony to prove, that Parker used every effort in his power to lock the other nag and start; that his conduct was fair, and not fraudulent;

and that his failure to lock was entirely owing to the restiveness of his nag. This evidence the court rejected, holding him bound to lock the other nag and run.

The defendant's counsel then took two exceptions to the plaintiff's right of recovery: First that the nags had never been locked, and that, by the terms of the articles, they were not bound to run until the nags were locked. It appearing that the plaintiff had frequently put his horse in a situation that Parker might have locked him, if his nag had not been restive and unruly; and that Parker had never put his nag in a situation to be locked, the court was of opinion, that Parker was bound by his agreement to lock the other horse, and that the restiveness of his own was no excuse for him. Secondly, that the plaintiff had not weighed his rider after he run his nag over the ground. To account for this neglect, the plaintiff offered to prove a parol agreement, made the day the race was run, to-wit, that as it was a rainy day, and they carried live weight *except their saddles*, the riders should not be weighed at the coming out. This evidence was rejected by the court; because it would establish, by parol testimony, a material fact variant from the written obligation. The plaintiff then proposed that it should
(33) be submitted to the jury, on the presumption that he had carried his weight, as his rider and saddle had been weighed before his horse was run over the ground, and he had carried the rider and saddle through the poles. And to support this presumption, a Mr. Hunter, said to be skilled in horse racing, was sworn, who stated, that if there was reasonable ground to believe the plaintiff's horse had carried his weight, it was sufficient.

The evidence was submitted to the jury, and they found a verdict for the plaintiff. The defendant's counsel moved for a new trial, and the cause was referred to this court.

TAYLOR, HALL AND LOCKE—*Judges.*—The weight to be carried by the plaintiff's nag being a certain number of pounds, his rider ought to have been weighed after he came through the poles. The parol testimony offered by the plaintiff, of an agreement not to weigh out, was properly rejected by the court. The plaintiff was as much bound to lock Parker's nag, as Parker his; and having run his nag without being locked, and without any fraud on the part of

Parker, is not entitled to recover. Therefore the rule for a new trial is made absolute.

JAMES MOORE *v.* RICHARD SIMPSON.

This was an action on the case brought by the plaintiff against the defendant, as stake-holder at a course race.

The plaintiff and one Chartres started their horses, and in running the last round of the first heat, at the commencement of the straight, the horse of Chartres left the track and run within the poles, but was reined into the track in time to be within less than a distance of Moore's horse when he passed the poles. The rider of Chartres' horse then alighted, and was some time in the crowd before he was weighed.

(34) The plaintiff claimed the race upon two grounds: 1st. That according to the rules of racing, Chartres' horse was to be considered a *distanced* horse. 2dly. That the rider of Chartres' having alighted without being *immediately* weighed, and being bound to carry a certain weight, he had thereby forfeited the race. And the opinions of many gentlemen well acquainted with the rules of racing, examined in court, were for the plaintiff on both those points, notwithstanding it appeared that Chartres' horse had run a greater distance by running within the poles, than he would have done by keeping the track.

The defendant shewed that it was provided by the 7th article in the rules of the turf, on which the race was run, that "The judges each day shall be chosen by the parties starting horses, or a majority of them, who shall determine all disputes and controversies that may take place respecting the race by them judged." And by the 11th it was in like manner provided, that "the races shall be conducted agreeably to the rules of New-Market, except where the cases are or shall be altered by the Jocky Club."

And that the judges chosen, according to the 7th article, determined against the plaintiff upon both the points above stated, and gave leave to Chartres to start his horse for the second heat: the plaintiff believing he was entitled to the race, refused to start his horse again; and Chartres' horse

being galloped around the ground alone, the judges directed the defendant to pay the money over to Chartres.

The question submitted to the court was, "Whether by the seventh article aforesaid, the plaintiff is concluded, by the opinion of the judges, from suing in a court of justice, and recovering upon the opinion of sportsmen and bye-standers, contrary to the opinion of the judges."

If the court shall be of opinion for the plaintiff, judgment to be entered for him, otherwise a new trial to be awarded.

BY THE COURT.—The opinion of the judges chosen by the parties to a race is not conclusive, and if they are (35) mistaken, or corrupt, such opinion ought to be set aside, and the justice of the case disclosed by other testimony; they are therefore, of opinion, the testimony was well received by the court, and that judgment be entered for the plaintiff.

THOMAS ORMOND *v.* KINCHIN FAIRCLOTH.

This was an action for detinue for a negro to which the plaintiff deduced the following title: The negro was the property of William Faircloth, deceased, at his death, and came to the hands of his administrator.

Benjamin Sheppard obtained two judgments against the administrator, in the county court of Lenoir, upon which writs of *Fi. Fa.* were issued to the sheriff of Glasgow, and levied on the negro in question amongst others, of which levy a return was made, and the sale of the property was stayed by consent of the plaintiff. After this levy a distribution was made, and the negro allotted to defendant.

At a subsequent term, writs of *Venditioni Exponas* issued, bearing test the first Monday in January, 1793, and returned the first Monday in March following: upon which writs the sheriff of Glasgow, after the test and before the day of return, exposed the negroes to sale, at public vendue, and bid off, himself, the one in question. On a subsequent day, before the day of return of the writs of *Vend. Expo.* the sheriff sold at private sale, and delivered the negro in question to John Grimsley, for the full worth of him. Grimsley continued in possession of the negro about four years, and delivered him

to his daughter, wife of the plaintiff. The plaintiff had him in possession till the first day of May, 1802, when the defendant took him.

Upon the trial, the Court instructed the jury, that the purchase of the sheriff, at his own sale, was void, and that the subsequent sale made by him to Grimsley, could not operate as a sheriff's sale, because it was not made
(36) at public auction: Whereupon the jury found for the defendant.

The plaintiff moved for a new trial, on the ground of misdirection to the jury, and obtained a rule to show cause.

BY THE COURT.—A sheriff cannot purchase property at his own sale; if he bids off property, the bidding is void; nor can a sheriff sell, at private sale, property levied on by him, by virtue of an execution. The rule is therefore discharged.

JACOB BLOUNT'S Adm'r *v.* CHARLES JOHNSTON'S Ex'r.

Ann Johnston by her last will, amongst other things devised as follows: "I give and bequeath unto my beloved nephew, Charles Earl Johnston, all my lands as follows: One tract of land in Chowan county, lying on Indian creek, called and known by the name of Boydsborough, containing six hundred acres; the other tract lying on Chowan river, in the county aforesaid, containing two hundred acres, and known by the name of the Rice Banks. Which said two tracts or parcels of land, I give and bequeath unto him the said Charles Earl Johnston, and his heirs forever, &c." And after several bequests of personal property, she further devised and directed as follows, viz. "I hereby make and ordain my worthy and trusty friend Jacob Blount, the whole and sole executor of this my last will and testament; and I do also hereby authorize and empower my before named executor to take upon himself the sole and whole management, *and disposal* of the rents and profits of the several tracts of land, so as aforesaid devised, *absolutely* and *exclusively* inasmuch as he may manage and *dispose* of the rents and profits of the said tracts of land, so as aforesaid devised, of whatever kind soever, *without the restraint or con-*

straint of any person or persons whatever, until my
(37) said nephew, Charles Earl Johnston, shall arrive at the age of twenty-one years."

It was admitted, that the said Charles E. Johnston, at the time of making the above will, lived with his father, Charles Johnston, Esq. who possessed a large independent fortune, and maintained and educated his son, the devisee, in a genteel and liberal manner.

The question was, "Whether Jacob Blount the executor, or the devisee, was entitled to the profits of the lands devised during the minority of the devisee."

BY THE COURT.—There is nothing upon the face of this will, which warrants us to believe that it was the intent of the testator to give the profits to the executor, for his private benefit. It seems to be a naked authority to manage and dispose of the profits, but to do so for the benefit of the devisee.

JOHN MOORE *v.* DANIEL PARKER.

Action of debt on a bond, plea *Non est factum*, payment set off and the act of Assembly directing the manner in which bets on horse races shall be recovered.

The subscribing witness proved the signing and sealing of the bond, that it was given for money won on a horse race, to-wit: The best two in three heats, one mile. The defendant's counsel then asked, if the bond was delivered by the defendant to the plaintiff, or to any other person, upon conditions. To this question, the counsel for the plaintiff objected, on the ground that it was intended to shew the bond was delivered as an escrow, without pleading that it was so delivered. The court over ruled the objection; and the witness answered, that the bond was delivered to one Copeland, to be the deed of the defendant, if the plaintiff won the race.

The plaintiff could not shew articles in writing con-
(38) taining the terms of the race, and that he had won the race; and, therefore, the defendant had a verdict.

It was, in the course of the trial, contended by the plaintiff's counsel, that this case being within the first section of the act of Assembly, and the race a course race, within the proviso of the act, he was entitled to a verdict.

BY THE COURT.—The evidence of the subscribing witness, proving the deed to be delivered to a third person, was properly received by the court; and in all racing contracts, it is incumbent on the plaintiff to bring his case within both sections of the act of 1800; and, therefore, the rule for a new trial must be discharged.

ELIZABETH WYNNE *v.* MISHAW ALWAYS.

Appeal to Newbern Superior Court, on a guardianship. The questions reserved for the opinion of this court were "Whether the choice of a guardian made by a person between the ages of fourteen and twenty-one years, is absolute so as to preclude the exercise of the judgment of the county court, on any point not relative to the security to be given?" If this question be determined in the negative "Whether the court, who rejects the choice, is not to give leave to the minor to nominate a more proper person?" or "Whether the court may not appoint the person to them most proper?"

If the court are of opinion that the county court may appoint without regarding the choice of the infant, or offering him a second nomination, the judgment to be for the defendant, otherwise for the plaintiff.

BY THE COURT.—Guardianship in socage departed with tenure in socage. The court is not bound to appoint the next of kin, or the person chosen by a minor above fourteen years of age; but by virtue of the act of assembly
(39) may and ought to appoint that person who, in their discretion, they believe will best execute the duties of the appointment.

CHURCHILL AND LAMOTTE *v.* ADMINISTRATOR OF ABRAHAM COMRON.

The plaintiffs sued out a writ against A. C. returnable to Jones county court, November session, 1799. The writ was executed; the defendant died before the return, and at the return a *Sci. Fa.* issued against his administrator. The *Sci. Fa.*

was returned to February sessions, executed, and the administrator appeared and plead, "Set off, fully administered generally and specially, former judgments, *no assets but to the amount of £120, which are liable to a suit, Slade and Jocelyn against defendant.*" At May session 1800, the defendant plead "*a judgment confessed in favor of Slade and Jocelyn, and other judgments, since the last continuance, and no assets over.*" To this plea the plaintiffs demurred generally.

The county court gave judgment on the demurrer for the defendant; the plaintiffs appealed to Newbern superior court and by their order the case was referred to this court.

BY THE COURT.—The plea is not good; let judgment be entered for the plaintiffs, on the demurrer.

ELISHA STOCKSTILL *v.* JOHN SHUFORD *et al.*

The plaintiff brought an action of trespass, assault and battery against six defendants; they employed different counsel, and severed in their defence, each pleading *Not Guilty* severally. The issues were all submitted to the jury at the same time, who found four of the defendants *Guilty*, and the other two *Not Guilty*.

The question referred to this court, was, "Whether
(40) the defendants who were found *Not Guilty*, were entitled to their costs, and what costs?"

BY THE COURT.—The defendants found *Not Guilty*, are entitled to their costs separately, including each an attorney's fee.

COMMISSIONERS OF FAYETTEVILLE *v.* WILLIAM JAMES.

Verdict for the defendant. Rule to shew cause why a new trial should not be granted.

A new trial had been granted the plaintiffs in this cause and the jury having found another verdict for the defendant the court doubted the propriety of granting a second new trial, and referred the question to this court.

BY THE COURT.—A new trial is granted, on payment of the costs.

JUDGES OF THE COURT OF CONFERENCE

OF

NORTH CAROLINA,

DURING THE YEAR 1805.

SPRUCE MACAY, Esquire,
JOHN LOUIS TAYLOR, Esquire,
JOHN HALL, Esquire,
FRANCIS LOCKE, Esquire.

HENRY SEAWELL, Esquire, Attorney General.
EDWARD JONES, Esquire, Solicitor General.

CASES

ARGUED AND DECIDED IN THE

COURT OF CONFERENCE,

OF

NORTH CAROLINA.

JUNE TERM, 1805.

WALKER *v.* MEBANE AND RAINEY.

From Hillsborough.

A. gave a negro slave to his niece B. and agreed to keep the slave at his own expense during his life. Before A's death, B. intermarried with C. who after A's death brought an action of detinue for the slave in his own name. The possession of the slave having vested in B. by the gift, and A. having held her during his life for the use of B., C. can maintain the action in his own name.

This was an action of detinue for a negro girl slave; and upon the trial it appeared that William Mebane gave to his niece, Jennet Graham, the negro slave in question when she was a small girl, and not wishing to seperate her from her parents during his life, he agreed with his niece to keep the negro girl at his own expense during his life. She remained with him accordingly. Before his death, his niece Jennet Graham intermarried with the plaintiff, John Walker, who, after the death of William Mebane, brought this suit against the defendants Mebane and Rainey, who as executors of said. William Mebane's will had taken the negro girl into their possession. A question arose upon the trial, and was sent to this court for the opinion of the Judges, " Whether the plaintiff could maintain this action in his own name, and whether it ought not to have been brought in the names of himself and his wife Jennet?"

BY MACAY, TAYLOR AND LOCKE, *Judges.*—We are of opinion that the action will lie in the name of the husband alone, and that the name of the wife need not be joined.

HALL, *Judge.*—Contra.

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(42) MATTHEWS' ADM'R, &c. *v.* DANIEL, EX'R, &c.

A. bequeaths a negro and horse to B. and declared that if B. should depart this life *without heir lawfully begotten of her body*, the negro and horse should belong to C. The limitation to C. is too remote.

The bill charged that Judith Brinkley by her last will bequeathed "to her daughter Elizabeth Harris, a negro fellow named Bob and a bay horse, and declared that if her daughter should depart this life without heir lawfully begotten of her body, the said negro and horse should belong to Anne Daniel." That the complainant James Matthews, intermarried with the said Elizabeth Harris, who sometime afterwards died, and complainant obtained letters of administration on her estate: That the defendant Lewis Daniel was at the time of the bequest aforesaid intermarried with the said Anne Daniel and was appointed executor of the last will of the said Judith Brinkley: That he had proved the will and qualified as executor; and since the death of complainant's wife Elizabeth, had set up a claim to the said negro and horse under the will of Judith Brinkley, and refused to deliver the said negro and horse to complainant. The bill charged that complainant was advised, the absolute property of the said negro and horse vested in Elizabeth, the legatee first named in the said bequest, and prayed that defendant might be compelled to deliver them to complainant or to submit to such other decree as the court might make in the premises. To this bill the defendant demurred, and the complainant having joined in demurrer the case was sent to this court for the opinion of the Judges.

BY THE COURT.—Anne Daniel was to take the negro and horse, if Elizabeth Harris should depart this life "without heir lawfully begotten of her body." This is in substance a limitation over after a dying without issue. The limitation

is too remote: The absolute property vested in the first Legatee, and the demurrer must be overruled.—(*a*)

(*a*) If this decision be correct, it would seem that in construing devises, the court will not look to the subject matter of the devise as a circumstance from which the intention of the testator may be inferred: for it is evident that in limitations of interests in individual animals, whose period of existence is shorter than that of man, the limitations over must vest, if at all, within the period of a life or lives in being and twenty-one years afterwards. In construing devises, the object of the court is to ascertain the intention of the testator, and if legal, to give it effect. In inferring this intention from circumstances, where it is not plainly expressed, courts are governed by certain technical rules, which have been established for the purpose of aiding the court to find out the intention. Among these rules, one which seems to have the most extensive influence is this, "that wherever an executory devise is limited to take effect, *after a dying without heirs or without issue*, subject to no other restriction, the limitation is void; because in such cases the testator will be presumed to have intended to render the estate unalienable until there should be a general indefinite failure of issue." This rule, however, was found in its application often to defeat the intention of testators, and some exceptions were made to it: one in particular, that if the subject matter of the devise was *real estate*, and the devise made in words which created an estate-tail by implication, the limitation over shall be void; but if of *personal estate*, the court will consider the intention of the testator, and support the limitation over, if there be the most trifling circumstance to shew the intention to be legal. This exception is founded upon the fact, that in construing devises, the court will look to the subject matter of the devise. In the above case, the bequest to Elizabeth Harris is in words, which if applied to a freehold, would not create an *express* estate-tail; they create such estate by *implication* only. There is no such a limitation as *must*, in its legal operation, constitute an estate-tail. Then it is open to the court to consider the intention of the testatrix; 1 Term. Rep. 593 And if we look to the subject matter of the bequest, can we doubt the intention? When the testatrix limits over a negro man slave "after a dying without heir of the body of Elizabeth Harris," can she be supposed to have intended that this limitation should not vest until a longer period than a life in being and twenty-one years afterwards, when the negro could not by possibility live so long? The same question may be asked more emphatically as to "a horse." If the intention of a testator is to be collected in the language of Mr. Justice Wilmot, 3 Burr. 1533, "from the whole of the will, *ex visceribus testamenti*," and circumstances are to be looked to for this purpose, does not the subject matter of the devise often constitute one of the most decisive? It would seem strange, that in construing devises the court would take notice whether the estate be real or personal, and give a different construction as it might be the one or the other, and yet refuse to take notice that the personal estate is of such kind that it cannot by possibility of nature be *in esse* after the period of a life in being and twenty-one years afterwards. In the above case of "Mathews, adm'r, &c. *v.* Daniel, Executor, &c." the court must have founded their judgment upon one of two grounds: first, That the technical rules of construction forbade them from considering the intention of the testatrix; or secondly, That in cases open for considering the intention, the subject matter of the devise will not be looked to as a circumstance from which the intention may be inferred. It is not probable their judgment was rested

(43) COLSON'S EXECUTORS *v.* WADE'S EXECUTORS.

From Fayetteville.

After judgment by default and before the execution of a writ of enquiry, the defendant dies. The plaintiff executes his writ of enquiry and final judgment is rendered in his favour—This judgment is erroneous and void in law, and reversible upon a writ of error.

This was a writ of error brought to reverse a judgment recovered by Thomas Wade against John Colson and others in Anson county court, in the year 1782. The facts were, that Thomas Wade sued out an original attachment against John Colson, Isaac Fortenberry and others, returnable to the county court of Anson; which attachment being levied and returned, and the defendants failing to appear and replevy the property levied on, judgment by default was entered against them at July term, 1782, and a writ of enquiry awarded. On the first day of August, 1782, Isaac Fortenberry, one of the defendants, died, and at October term of the same year, the writ of enquiry was executed; the plaintiff's damages were assessed and judgment rendered against the defendants. The error assigned was that before the (44) giving of the said judgment, Isaac Fortenberry, one of the defendants died, and the jury having found that he died in August, 1782, subsequent to the judgment by default, but before the rendering of the final judgment upon the execution of the writ of enquiry, the case was sent to this court upon the question, "whether the said judgment was erroneous and ought to be reversed?"

upon the first ground; for the technical rule is, "that where there is *an express* limitation of a chattel *by words*, which *if applied to a freehold*, would create an *express* estate tail, the whole interest vests absolutely in the first taker, and a limitation over of such a chattel is too remote to take effect; but where there is no such *express* legal limitation, *the court will consider the intention of the testator.*" Lyde *v.* Lyde, 1 Term Rep. 593.—In the above case, there is no such *express* legal limitation; the words, if applied to a freehold, would create an estate-tail by implication only, the technical rule therefore left the court at liberty to consider the intention of the testatrix, to reject the artificial and technical sense of the words "dying without heir lawfully begotten of her body," and of using those words in their natural meaning and for that purpose which is in favor of common sense; and for using those words in this meaning and for this purpose, Lord Ch. Jus. Wilmot observes, in the case of Kelly and Towler, the most trifling circumstance is sufficient in all cases where the court is at liberty to consider the intention of the testator. In the selection of circumstances to ascertain the meaning of the testator, no reason can be assigned why the subject matter of the devise, which in many instances is more indicative than any other circumstance, should be excluded.

BY THE COURT.—The judgment in this case is erroneous and void in law: let it be reversed and the plaintiffs in error be restored to all things which they have lost thereby, and the defendants in error pay the costs.

MALLISON *v.* HOWARD.

From Newbern.

Upon the suggestion of a defendant's death his administrator ought to be made a party by a *Scire Facias*, and an order "that the administrator be made a defendant, unless he shews cause," being served upon the administrator he appeared and shewed for cause, that the order was irregular and improper; whereupon the rule for making him a party was discharged.

The death of defendant being suggested, an order was made "that Sally Howard, administratrix of George Howard deceased, be made defendant in this case, unless cause shewn to the contrary at next term." A copy of this order having been served on Sally Howard, she appeared and shewed cause, to wit, that the said order was irregular and not conformable to the provisions of the statute in such cases made and provided; that the representatives of the defendant George Howard must be made a party by a *scire* (45) *facias*, and therefore she prayed to be dismissed, Whereupon it was submitted to this court, "whether the mode adopted was regular and proper?"—If the court should be of opinion that the mode was irregular and improper, the rule to be discharged; otherwise, to be made absolute.

BY THE COURT.—The object of a *scire facias*, which the act of Assembly directs to be issued in cases like the present, is to enable the executor or administrator to shew cause why he should not be made a party, and no peremptory order is made, that he shall be made a party, until an opportunity is afforded, to shew cause, upon the return of the *scire facias*. The order made in this case was irregular and improper; the rule must therefore be discharged.

ALSTON'S EX'RS *v.* JONES' DEVISEES.

From Hillsborough.

A. as attorney in fact for B. conveys lands to C. and afterwards he conveys the same lands to D. Upon the trial of an issue directed by the Court of Equity, "whether the conveyance to B. was made to him upon a valuable consideration as a purchaser before the execution of the conveyance to D."—A. is a competent witness.

Joseph Landrum being seized in fee of a tract of land lying in Chatham county, constituted and appointed Samuel Landrum, his attorney in fact to sell and convey the same; and the said Samuel as attorney for the said Joseph conveyed the land to Matthew Jones, by deed bearing date the 20th day of April, 1775. This deed purported to be absolute and for a valuable consideration. In the year 1777, Samuel Landrum executed another deed for the same land to Thomas Brooks, who conveyed to Joseph John
(46) Alston, and he by his last will and testament devised the said land to complainants, who filed their bill in the Court of Equity for Hillsborough District against the devisees of the said Matthew Jones, and therein charged that the conveyance from Samuel Landrum to Matthew Jones, was executed for no other purpose than to enable Jones to sell and convey the land for the benefit of Landrum; that no valuable consideration was paid nor agreed to be paid: and that Jones held the legal estate in the land in trust for Landrum and his assignees. That Thomas Brooks was a purchaser from Landrum for a valuable consideration, and those claiming under him were entitled in Equity to have the legal estate decreed to them, &c.

To this bill the defendants answered and alleged that it was expressly agreed between their testator Matthew Jones and Samuel Landrum, at the time of the conveyance aforesaid, that Jones might either sell the land or hold it himself, he paying to Landrum the purchase money named in the deed; that Jones had elected to take the land, and had paid part of the purchase money before the conveyance was made by Landrum to Brooks. It was further insisted that various artifices were resorted to, to induce Landrum to convey the land to Alston and that this conveyance was procured by false representations and without any valuable consideration either paid or secured to be paid to Landrum, &c.

The cause was set for hearing, and the court having ordered an issue to be tried, "Whether the conveyance to

Matthew Jones was made to him upon a valuable consideration, as a purchaser, before the execution of the deed to Thomas Brooks?" the defendants offered in evidence sundry depositions, and among others, that of Samuel Landrum, which was admitted by the court, and the jury found that the conveyance to Matthew Jones, was made to him upon a valuable consideration as a purchaser, before the execution of the deed to Thomas Brooks—Whereupon the court (47) ordered the bill to be dismissed with costs. Upon motion of the complainant's counsel, the case was sent to this court upon the whole evidence, and upon the question, "Whether Samuel Landrum was a competent witness upon the trial of the issue aforesaid?"

BY THE COURT.—We are of opinion that the deposition of Samuel Landrum was properly admitted in evidence upon the trial of the issue in the court below; and the Jury having found that the conveyance to Matthew Jones, was made to him as a purchaser for a valuable consideration, before the execution of the deed to Thomas Brooks, the decree of the court below must be confirmed and the bill be dismissed with costs.

OVERTON *v.* HILL.

From Fayetteville.

Money paid into the office upon an execution cannot be attached in the hands of the clerk at the instance of a creditor of the plaintiff in execution. Motion to stop money *in transitu*, which has been paid into the office upon an execution at the instance of B. and to apply the money to the discharge of a judgment against B. is not allowed of course, and will not be granted unless good cause be shewn.

Thomas Overton having recovered a judgment against Jno. Hill, in Fayetteville Superior Court, execution was issued and the money levied, and on the return-day of the execution, the money was paid into the office. On the same day the clerk of the court was summoned as a garnishee at the suit of Hector M'Alister against the said Thomas Overton, on an attachment returnable to the county court of Cumberland. The attorney in fact for Thomas Overton applied to the clerk for the money which had been paid into the office

upon the aforesaid execution against Hill: and Patsy Glascock having recovered a judgment against the said Overton in the said court, which judgment remained unsatisfied, a motion was made to the court on her behalf, that the balance of the said money, after the judgment to be recovered upon the attachment aforesaid should be satisfied, should be applied towards the discharge of her said judgment. The case was sent to this court upon the following questions: first,
(48) whether the money paid into the office upon the execution against Hill was liable to be attached at the instance of M'Alister, in the hands of the clerk? And secondly, whether the court will apply the money paid into the office for Overton, to the discharge of Patsy Glascock's judgment against him?

BY THE COURT.—The money paid into the office upon the execution against Hill cannot be attached at the instance of Overton's creditors; nor will the court apply this money to the discharge of the judgment which Patsy Glascock recovered against Overton, no reason being shown to the court why this money should be stopped *in transitu*, and such an application not being allowed as of course.

MORELAND *et al. v.* MAJORS, Executor of Moreland.

From Hillsborough.

A. devises "to his son Thomas during his natural life a negro girl: and after his decease, he gives the said negro and her increase, to his grandson Francis, to him and his heirs forever; and *in default of such issue*, the said negro and her increase to be equally divided among his brothers and sisters *then living*." The limitation over to the brothers and sisters of Francis is valid, and the words "in default of such issue," mean the failure of issue at the death of Francis: the word "then" is here used as an adverb of time, and points to the default of issue at the death of Francis.

This was an action of detinue for sundry negro slaves. The jury found a verdict for the plaintiffs, subject to the opinion of the court on the following case:

"Francis Moreland of the county of Dinwiddie and State of Virginia, departed this life in the year 1765, having previously published in writing his last will and testament, in which is contained the following clause, to-wit: "I lend to

my son Thomas during his natural life one negro girl named *Phebe*, and after his decease I give the said negro and her increase to my grand son Francis Moreland, son of the said Thomas, to him and his heirs forever; *and in default of such issue*, the said negro and her increase to be equally divided amongst his brothers and sisters *then living*." Francis Moreland died in the year 1802, without having had any issue, and his brothers and sisters living at the time of his death brought this suit to recover the negro woman Phebe and her increase; and it was referred to this court to decide "whether the limitation to the plaintiffs was valid?"

This case was argued by Brown and R. Williams
(49) for the plaintiffs, and Haywood for the defendant.

The authorities relied upon are noticed in the opinion of the court.

TAYLOR—*Judge*—Delivered the opinion of the court. The decision of this case depends upon the construction of the third clause of the will of Francis Moreland. On the part of the plaintiffs it is contended that the limitation to the brothers and sisters is so expressed, that it must take effect, if at all, at the death of Francis Moreland, and that, consequently it is within the limits prescribed by law for the vesting of an executory devise. On behalf the defendants, it has been argued, that the limitation to the brothers and sisters is void, as being to take effect after an indefinite failure of issue of Francis Moreland, to whom, likewise, the negroes are given by such words as, if applied to real estate, would amount to an estate-tail, which therefore transfers an absolute interest in chattels. Upon the first argument of this case, the court inclined to the latter opinion; but upon maturely considering the cases cited, a majority of our brethren have been led to think differently. I will state the grounds upon which their present opinion is formed: In doing which, it will not be necessary to notice particularly every case that has been read; because however proper and apposite they might be, according to the manner in which the argument has been conducted by the counsel, they are not necessary to be resorted to in the views which we have taken of the subject.

Executory devises of chattels are a departure from the ancient common law, according to which, the gift of a chattel for any period of time, amounted to an absolute disposition

of it, and any limitation over was void. The distinction between the use of a thing, and the thing itself, continued, as applied to chattels personal, even after it was overruled as to chattels real; and whether an executory devise could be created of the former, was questioned, after the decision of the Duke of Norfolk's case had finally established its competency with respect to the latter. This appears
(50) from 1 P. Williams 1, and 2 Vern. 331. Since the period of these decisions, it has not been doubted, that future interests in the nature of remainders may be created in chattels personal, by the means of trusts and executory devises.

The convenient and beneficial manner in which provision could thus be made for families and children's portions, induced the courts to countenance executory devises; but on the other hand it was foreseen that an unlimited indulgence of them might introduce all the mischiefs which it was the policy of the statute *de donis* to sanction, since there was no way of destroying entails created in this form. It was settled at a very early period of their adoption, that entails by executory devise, could not be barred by fine or recovery. If they consisted of real estate the devise could not be barred by fine, because the title of the devisee was independent of the immediate taker; nor could the estate of the devisee be destroyed by recovery, because the recompense, which, in this fictitious mode of proceeding, is the ground of barring the issue in tail and those in remainder and reversion, doth not extend to an executory devise. Cro. Jac. 590. If they were of personal estate, they could not, from the nature of the property, be the subject of either fine or recovery. Hence it became necessary to limit and confine this mode of settlement, that entails so made should not last longer than the law permits where they commence by creating estates for life and estates-tail with remainders over. It is therefore in analogy to the rule which prevails at law in relation to strict entails, which cannot be protected from fine and recovery longer than the life of tenant for life and the coming of age of his first issue, that a principle is applied to executory devises, with regard to the time of their vesting. This must be a life or lives in being and twenty-one years after; to which are added a few months for the case of a posthumous child. Every contingency therefore, which must happen, if at all within that period of time, is sufficient to support a

limitation over. But an executory devise cannot be
(51) limited on a failure of issue of the person named, whenever it happens. It is however to be remarked, that although a fine or recovery will not bar the entail of a chattel on account of the nature of the property, the danger of perpetuity is nevertheless avoided by the operation of the principle, which declares the vesting of an interest, which would be an estate-tail, bars the issue and all subsequent limitations.

The rule therefore fixing the time within which an executory devise must take effect, is equally clear and well settled; but from the language in which wills are sometimes penned, a difficulty has arisen in most of the cases, to ascertain whether the rule is observed or transgressed. Rules of construction have therefore been resorted to, and have been employed in a great variety of cases for the purpose of effectuating the intention of the testator. A few of these which may be considered as undoubted law, I shall cite and adopt as the ground of our opinion.

1st. That such a construction ought to be put upon the words of a will as, upon a fair consideration of the whole context, it is evident the testator intended they should receive unless some rule of law is thereby violated.

2d. That where personal estate is limited after a dying *without issue*, those words do not necessarily import a general failure of issue, although the first devise may be of an express estate-tail. Nor in the case of an estate-tail by implication, do they necessarily signify a dying without issue living at the death of the first devisee. If however the construction entirely depend on those words, the limitation in both cases is too remote; but in one case as well as in the other, the words may be confined to a dying without issue then living, if there be anything in the will from which such an intention can be inferred.

3d. The inclination of the court should be in favor of such a construction as will support the limitation over, if
(52) it can be done; and they should lay hold of any opportunity of referring such words to the want of issue at the time of death.

It may be inferred from the phraseology of several clauses in this will, that the testator was apprised of the rule of law which renders limitations void, after an indefinite failure of issue; since he has by apt and significant terms confined the

failure to the death of the first taker. This he has done in every instance where the first devise is to one son and the limitation over is to another. Upon the first, second and fourth clauses of the will, the limitations over must vest, if at all, at the end of a life in being. The words are, "if my son should die without issue living at the time of his death." In every instance where the limitation over is to one person, and that person is a son, the failure of issue is most carefully tied up to the death of the first taker. In the third and fifth clauses, where sons are the first takers and the limitations over are to grandchildren, a diversity of phraseology is introduced. The testator however manifestly intended to make a substantial provision for his grandchildren in the event of his sons dying without leaving issue. The supposition that the clauses in their favor are inserted in the will, with a knowledge and belief that they are nugatory and could have no legal operation, is wholly inadmissible. (a) But it may be asked, as the testator knew the necessity of

(a) The clauses of the will referred to by the court were in the following words:—

1. "I give and bequeath to my son Thomas and the heirs of his body lawfully begotten, the following negro slaves, to-wit:—Jenny, Sue, &c. and their increase, but if my said son Thomas should die without issue living at the time of his death, then I give the said negroes and their increase to my son Francis Moreland and his heirs forever.

2. I give to my son Thomas Moreland and the heirs of his body lawfully begotten, my plantation where I now live, containing by estimation two hundred acres, and in default of such heirs living at the time of his death, I give and devise the same to my son Francis and his heirs forever.

3. I lend to my son Thomas during his natural life one negro girl named Phebe, and after his decease, I give the said negro and her increase to my grand-son Francis Moreland, son of the said Thomas, to him and his heirs forever; and in default of such issue, the said negro and her increase to be equally divided amongst his brothers and sisters then living.

4. I give and bequeath to my son Francis Moreland and his heirs the following slaves, to-wit: Jude, Patt, &c. and their increase: But if my said son Francis should die without issue living at the time of his death, then I give the said negroes to my son Thomas Moreland and his heirs forever.

5. I lend to my son Francis during his natural life, one yellow girl named Patt, and after his decease, I give the said negro and her increase to my grand-son John, son of the said Francis, to him and his heirs forever, and in default of such issue, the said negro to be equally divided among his brothers and sisters.

6. I give and bequeath to my son-in-law James Oliver and his heirs, the following negroes, to-wit: Patt, Hannah, &c. and their increase; but if my said son in-law James Oliver should die without issue by my daughter Anne Oliver, living at the time of his death, then I give the

restraining the failure of issue to the death of the
(53) first taker, and has in other instances used adequate terms for that purpose, why has he not been equally cautious in the clause under consideration? To my mind the answer is clear and satisfactory. When he gives property to one son and his issue and afterwards to another, the chance was equal that the last might die before the first taker, and if he died leaving issue in the lifetime of the first taker, the testator was desirous that the bequest should be so expressed, as to be transmissible to that issue, in the event of the subsequent death of the first taker without issue. Hence, to the limitation over he has annexed words of perpetuity, and to the first disposition, words of proper restric-
(54) tive import. When however the limitation over is made in comprehensive terms, to several grand-children, who were all alive at the making of the will it was to be expected according to the ordinary chances of human life, that some of them would survive their brother; that consequently it would be determined during the lifetime of some of them, whether the first taker died with or without issue; and as all the lives were in being, it seemed less necessary to use the words "without issue living at his death," because the intention was, if he died without issue in the lifetime of any of his brothers and sisters. And it was of no importance that the failure of issue was made to depend on several heirs; for the case seems to shew that any number of lives may be taken, provided they are all in being when the will is made. From these observations I deduce the conclusion, that the testator believed when he wrote this clause that he had adopted language sufficiently expressive, and of force equivalent to that which he had used in making the bequests to his sons, but varied in order to correspond with the relative

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said negroes to the children of my two sons Thomas and Francis Moreland to be equally divided.

7. I lend to my daughter Anne Oliver during her natural life one negro girl named Dinah, and after her decease, I give the said negro girl and her increase to my grand-daughter Mary House, to her and her heir forever.

8. I lend to my daughter Anne Oliver, during her natural life one negro boy named Dick, and after her decease I give the said negro boy to her son Francis Oliver and the heirs of his body lawfully begotten, and in default of such issue, the said negro to be appraised and the money equally divided amongst his brothers and sisters.

9. I give all the rest and residue of my estate to be equally divided among my children then living.

situation of his grand-children. To those who should be alive when his grand-son Francis might die without issue, he intended a personal benefit; and that some of them would survive him, he contemplated as a probable event. The case of Hughes *v.* Sayer, 1 P. Williams, 534, though not a direct authority in this case, resembles it with respect to the principle I now advert to. There, one, having nephews A. and B. devises his personal estate to A. and B. and if either die without children, then to the survivor. The master of the rolls decided that the words "dying without children" must be construed, living at the death of the party. That they could not signify, when there should be a failure of issue, because the limitation over was to the surviving devisee; and it was not probable that if either of the devisees should die leaving issue, the survivor should live so long as to see a failure of issue, which in notion of law was such a limitation as might endure forever; and therefore by reason of the limitation over in case of either of the devisees dying
(55) without children, then to the survivor, the testator must have intended to mean, a dying without children living at the death of the parent: consequently the devise was good. To the same effect is the case of Nichols *v.* Skinner, Prec. in Chan. 528. Where a legacy was given "to A. B. &c., and if any of them die without issue, his or her share to go over to the survivors or survivor;" the limitation over was supported on the ground that the testator intended a personal benefit to the legatee over, and therefore meant to confine the failure of issue to their lives. The sixth clause in the will is the only one, where, before a limitation to grandchildren, he confines the failure of issue to the death of the first taker. That however seems to have arisen from the peculiar nature of the disposition he was desirous of making to his son-in-law Francis Oliver; the legacy is confined to the children he might leave by the testator's daughter, and therefore he particularly confines it to such children of that description as he might leave at the time of his death. Had he designed that any issue of Francis Oliver should enjoy the bequest, it is probable he would have contented himself with using the words "and in default of such issue," as he uniformly does in the other clauses relative to grandchildren.

It is generally true that a limitation of personalty after *a dying without issue*, is void, and if there are no other expres-

sions to resort to for the construction of those words, the devise over cannot be supported. The intention of the testator must be regarded where there is no express legal limitation; and although the words import an estate-tail, yet if there be any circumstances from which it can be fairly inferred that such was not the intent of the testator, the devise over is sustainable. The language of this clause of the will would, if applied to real property, create an estate tail; not because it is a formal legal limitation of such an estate, but because there could not be a default of the heirs of Francis Moreland, while his brothers and sisters were living; and the testator must therefore have meant lineal heirs. Cro. Jac. 475, Cowp. 234. But there are other words in this (56) clause, which are to be brought into view, in order to form a just construction, and from them it will probably appear, that the testator meant to restrain the failure of issue to the lives then in being. These words are, "to be equally divided amongst his brothers and sisters then living." The enquiry therefore is, what did the testator mean by those expressions? If he meant to devise the negroes over to the brothers and sisters that might be living, when the default of lineal heirs might happen, whenever that might be, it is clearly too remote. But if he meant the brothers and sisters living at the death of Francis Moreland without lineal heirs, then it is properly restrained, and the plaintiffs are entitled. That he designed the latter, I infer, 1st, from the manner in which he has used the same expressions in the last clause of his will; 2ndly, from the meaning which has been put upon these words in several authorities.

In the last clause of the will the test ator gives "all the rest and residue of his estate to be divided among his children then living." It is evident that in this instance the testator has used the words as referring to the time of his own death. They will not admit of any other possible construction, nor is it necessary to seek for any other, for the operation of the will is precisely the same with or without these words. They were probably inserted from abundant caution, but being used in an unambiguous sense and in reference to the event of death, in this clause, the conclusion is entirely fair, obvious and natural, that he meant to use them in reference to the same event, in the third clause of his will. Such a meaning is the more strongly forced upon us, when

we consider that it is rendering the construction subservient to the intention.

2dly. The construction which the expressions in this will or similar ones have received, seems to have arisen from a principle which has now become a fixed axiom in a court of chancery, and is thus stated in 2d Fearne, 186, "That with respect to executory devises of terms for years (57) or other personal estates, that court has very much inclined to lay hold of any words in the will, to tie up the generality of the expression of "dying without issue," and confine it to dying without issue *living* at the time of the person's decease." Target *v.* Gaunt, 1 P. Wms. 432, is an instance of this mode of construction; and indeed the cases are so numerous that I shall barely refer to Fletcher's case, 1 Eq. Abr. 193, where there was another event besides that of death, to which the words "then living" might have related, and to which they referred in strict grammatical construction; yet for the sake of supporting the limitation over, they were interpreted a dying without issue living at the time. Without taking up more time upon this part of the case, I will only add, that it appears to the majority of our brethren, the intention of the testator, to be collected from the whole will, was that the brothers and sisters of Francis, who should be alive at the time of his death without actually leaving issue, should be entitled, and that consequently the plaintiffs are entitled in the judgment of the court.

HALL, Judge—*Contra.*—Brothers and sisters *then living*, mean brothers and sisters who shall come into being, as well as those already in being where they are to take on a future event: if to take a present interest, they mean brothers and sisters in being—Cowp. 312. Consequently, as the brothers and sisters here spoken of were to take on a future event, should it happen, all those born after making the will, who shall be living when the event occurs have an equal claim with those in being when the will was made. As to the ulterior limitation, to be good it must be such as must take effect if at all in a life in being and 21 years after. Now here suppose Francis died, leaving a son, and then Thomas had issue, another brother or sister of Francis, and twenty-two years after the death of Francis his son should die without issue under the terms used in the limitation now under consideration, the issue of Thomas, born after the life-time of

Francis would take, although the event upon which the ultimate limitation depended, did not take place until
(58) 22 years after the life of Francis or it might have been 40 or 50 years after; for the issue born after the death of Francis might have lived 50 or 60 or even 80, and the son of Francis or the son of that son might have then died without issue 60 or 80 years after the death of Francis. A brother or sister of Francis might be then living, and might say, the estate is mine, for I am a brother living at the period when Francis is dead without issue. Whenever the issue of Francis fails he is in law said to be dead without issue. This then is not such a limitation over as must take effect, if at all, within a life in being and 21 years after: it may take effect if allowed to be a valid limitation 50 or 60 years after that period; and I am therefore of opinion it is void in law. The words "then living" used in the other parts of the will, tie up the event to the death of the legatee for life, in precise terms; which proves that the writer of the will well knew how to confine the limitation over to that event when he wished to do so—and proves to my mind that he did not mean it in the present instance.—He meant, as the words import, that the portion of Francis should go to all the children of Thomas, born and to be born, who should be living when the line of Francis failed.—He had no reason for preferring the children of Thomas who were born to those who were not so: he has not intended such preference.

Den on Demise of the TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA *v.* FOY AND BISHOP.

From Wilmington.

The 41st section of the constitution declares that "schools shall be established by the legislature for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices, and all useful learning shall be duly encouraged and promoted in one or more Universities."—In obedience to this injunction of the constitution, the legislature established an University, and in the year 1789, granted to the Trustees of the University "all the property that had theretofore or should thereafter escheat to the state." In the year 1800, the legislature repealed this grant.—This repealing act is void, it being in violation of the 10th section of the bill of rights, which is a part of the constitution and declares "that no freeman ought to be taken, imprisoned or disseised of his freehold, liberties or privileges, or outlawed or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land."

This was an action of ejectment brought to recover the possession of certain escheated lands in the district of Wilmington. The defendants pleaded in bar of the act of 1800, ch. 5, entitled "An act to repeal so much of the several laws now in force in this state, as grants power to the trustees of the University of North Carolina to seize and pos-
(59) sess for the use of the said University, any escheated or confiscated property."—To this plea the plaintiff demurred, and the defendants having joined in demurrer, the case was sent to this court for the opinion of the judges.

This case was argued by Haywood for the lessors of the plaintiff and by Duffey and Jocelyn for the defendants. The arguments relied upon for the defendants are noticed in the following argument of Haywood for the lessors of the plaintiff:

In 1789, the Legislature, by act of Assembly then passed, granted to the Trustees "all the property that has heretofore, or shall hereafter escheat to the state." By another act, passed in 1794, the Assembly granted to the trustees the confiscated property then unsold; and by another act, passed in 1800, it is enacted, "That from and after the passing of this act, all acts or clauses of acts which have heretofore granted power to the Trustees of the University of North Carolina, to seize and possess any escheated or confiscated property, real or personal, shall be and the same is hereby repealed and made void."

"*And be it further enacted*, That all escheated or confiscated property which the said Trustees, their Agents or Attorneys have not legally sold by virtue of the said Laws, shall from hence revert to the state, and henceforth be considered as the property of the same, as though such laws had never been passed."

In consequence of these provisions, it is imagined the Trustees have no title to the lands in question, because they are of the description mentioned in the act; and it is a question for the consideration of this court how far the Trustees have title under the former of these laws, and how far they are divested of that title by the latter.

It is supposed by some that the public property cannot be disposed of but by grant, because in the 36th section of the Constitution, it is directed "that all commissions and
(60) grants shall run in the name of the state of North Carolina and bear test and be signed by the Governor," &c. It does not say all property shall be conveyed

by Grant, and not otherwise: but when conveyed by grant, it prescribes the form; otherwise it would have been uncertain, who should authenticate the instrument; and the form would have been as different and discordant, as the opinions of successive officers were various, upon the subject of the most convenient and proper form. If the Legislature is at liberty to direct the officers of State to issue grants for certain property; surely they are at liberty to grant it themselves in a more solemn way by act of Assembly, which is an instrument subject to more scrutiny and solemnity in its passage than any other instrument known in our law. It cannot be thought, that there is more danger of imposition upon the *General Assembly*, in the disposing of public property by act of Assembly, than there is upon individual *officers* conveying by grant.

In truth, the passing of public property by act of Assembly, hath been practised almost ever since the formation of our Constitution; and has never been questioned. Some of our most learned Lawyers of former times, who had a principal share in forming the Constitution, approved soon afterwards of the mode of passing the public property in this way.

On the 18th of October, 1779, C. 17, a tract of land was vested by act of Assembly in Thomas Person, his heirs and assigns; on the same day another tract is declared to be and remain to Thomas Burk, his heirs and assigns: 17th April, 1780, a tract is vested in William Houston, his heirs and assigns; another in Hannah Reed. Similar instances occur in 1780, C. 40, 1782, C. 36, 1783, C. 38, C. 42, 1784, C. 71, 1786, C. 72, C. 82, 1787, C. 33, 1789, C. 56, and divers other acts passed since 1789. These several acts, demonstrate an unity of sentiment on this subject, not only of the profession, and of the Assembly, which has from time to time
(61) proceeded in this way; but of the public, who have never questioned the validity of such conveyances. A more important question is, whether it is true, as argued on the other side, that a repeal of the vesting acts, divests the Trustees of all the property acquired under the former laws, which had not been disposed of when the repealing act passed.

And if we consider either the nature of Conveyances, or of repealing acts of the Legislature; and if we at the same time admit the untrue position, that the Assembly had power, at pleasure, to reassume the property which they had parted

with by their grants; still we shall be obliged to acknowledge, that they have not divested the Trustees of this property.

It is incontrovertibly true in regard to the Conveyances of individuals, that if the title be transferred by deed or other instrument; and that be afterwards lost, cancelled, or otherwise destroyed; the title does not thereby revert to the grantor. Gilbert's Law of Evidence, 107, states precisely "that if a conveyance be made by lease and release, the uses were once executed by the statute, and they do not return back again by cancelling the deed;" and in this proposition he is supported by 1 Mo. 107. Buller's N. P. 267. It is upon this *principle* that a contract cannot be dissolved nor property transferred, but by consent of the party, who is entitled to the benefit of it—it cannot be dissolved by the arbitrary act of one party, to the prejudice of the other, and without his consent; nor can it be re-transferred by any act, which is not assented to by the legal owner. Is the Legislature released, from the operation of this principle? No: it is incorporated into the immutable law of natural justice; and no power upon earth can rightfully overturn it. How comes it then, that a declaration of the nullity of the vesting acts, made several years after the property has completely passed from the Legislature, without consent of the Trustees, shall again restore it to the state? Suppose such a declaration as
(62) completely to have destroyed those instruments of conveyance, as if they had been burned, or cancelled, or expunged from all the public records; still the title has already passed, and some further act was requisite to re-vest these titles—an act as we shall presently see far beyond the powers of the Legislature to perform. If the most complete destruction of the instruments of conveyance, will not restore the property, can such a consequence be derived from the nature of a repealing act? This question is solved, by considering the effect of a repealing act. In common with other acts, it has not any retrospective view; unless given it by express words. I do not deny but that the Legislature have power to pass retrospective laws, on subjects liable to their legislation: But such an exercise of power, is always the dictate of imperious necessity; is in itself odious; because it interferes with persons and things, who did not expect it, and is therefore not admitted; but when the words of the act unequivocally give it such a meaning. 4 Bur. 2461, 2 Mo. 310,

2 Just. 292. The repealing act then in the case before us, having no retrospective terms, commenced its operation precisely at that point of time when it passed.

What then became of all the property which had before that time vested in the Trustees? It was not in the least degree affected by the repealing acts. Our opponents say however, that the words of the repealing act resume, for the use of the state, all confiscated and escheated lands not then sold although parted with before, and extends expressly to all former acquisitions; and that the repealing act is really retrospective. For a moment be it so; then we are to enquire, not only what they have done, but also (which is far more material) what they had a right to do.

And in order to make a fair experiment of the extent of legislative power, let us see how far the Legislature can interfere with the rights of private property; how far with the property belonging to corporations; and then more particularly how far they have control over the property of
(63) the University of North Carolina. The intangibility of private property, is, to every community, a principle of the highest consideration: the industry of its inhabitants depends upon it, and the necessaries and the comforts of life, which are results of industry, are produced by a belief in every citizen, that what his industry procures will be peculiarly his own. In despotic governments none labour, because the earnings of labor are not free from invasion; and idleness and poverty, and the destitution of those things which render life agreeable, predominate.

North Carolina will find by fatal experience, the oftener her Legislature breaks in upon this great principle, the nearer will she approach to this representation of despotism. Every example of innovation which she gives, will lessen the assurance of individuals in its sanctity, because every new instance gives new strength to the practicability of invasion, exposing to public view the futility of the maxim, which professes to render private property inviolable. Deliberate but one moment on the consequence of this principle, and its vast magnitude will rush upon the senses. We shall be convinced of the reasons, why all wise governments have made it a fundamental maxim of their political institutions; and why in all free ones, it ought to be the most sacred. Those who argue for this power, can only derive it, either from the inherent rights of sovereignty, or from some

clause in the Constitution of North Carolina. If it be a right of sovereignty, it is because *salus populi est suprema lex;* and can only be resorted to, where the maxim applies—in cases of extremity, and when an abstinence from the use of private property, would endanger the public safety. Under such circumstances, it is better that one should suffer than all be ruined. Yet here, the individual who suffers to serve the public, must be compensated for his loss, because it is just that a loss sustained for the benefit of all should be borne equally by all. Thus compensation becomes a duty of the sovereign, without which he cannot rightfully practice the seizure of private property: to say that he
(64) will do it, without necessity and without compensation, would be called tyranny in an individual sovereign; and how is it the less so where the same thing is done by a collective body? Certainly there is no difference as to the individual who suffers. Vattel. B 1 C. 20, 244, decides that the right of eminent domain is in certain cases necessary for him who governs, and consequently is a part of the empire or sovereign power; but when he disposes in a case of necessity of the possession of a community or individual, the alienation will be valid for the same reason; but justice demands that this community, or this individual be recompensed out of the public money; and if the Treasury is not able, yet all the citizens are obliged to contribute to it; for the expenses of the state ought to be supported equally or in a just proportion: it is in this case as in the case of throwing of merchandise overboard to save the vessel. The Assembly of North Carolina, circumscribed in its capacity by the fundamental law of the Constitution, cannot pretend to greater prerogatives than the Parliament of Great Britain, whose power is thus described by the most learned British authors, 1 Bl. C. 160. "The power and jurisdiction of Parliament is so transcendant and absolute, that it cannot be confined either for causes or persons within any bounds! it hath sovereign and incontrovertible authority, in making, confirming, enlarging, restraining, abrogating, repealing, reviewing and expounding of laws; concerning matters of all possible denominations; ecclesiastical or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power which must in all governments reside somewhere, is intrusted by the constitutions of these kingdoms.

"It can in short do everything that is not naturally impossible, and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament." All-powerful however as it is, like the Gods, who are bound by the decrees of fate, it bows down before the sacred image of which I am speaking, and reverences
(65) the holy rights of private property. 1 Bl. C. 139, shews the regard that is paid to them, "So great moreover" says he, "is the regard of the law for private property, that it will not authorise the least violation of it: no not even for the general good of the whole community. If a new road for instance were to be made through the ground of a private person, it might perhaps be extremely beneficial for the public; but the law permits no man or set of men, to do this without consent of the owner of the land. In vain may it be argued, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any Private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases, the Legislature alone have, and indeed frequently does interfere, and compel the individual to acquiesce. But how does it interfere and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification, and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All the Legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the Legislature indulges with caution; and which nothing but the Legislature can perform." The despotic Legislature of Great Britain cannot intermeddle with the rights of private property, but in cases of urgent necessity, and not without making just compensation. And shall the Assembly of North Carolina encroach upon those rights, when not required by public necessity, and without making any compensation at all? I would fain know, in a concern of such moment, whence it is, that they are less bound to respect the rights of private property than the Eng-

lish Parliament? and upon what occasion it was,
(66) that the people cloathed them with a discretion so fatal to their dearest interests. To speak in commendation of the British constitution, is unpleasant to an American ear, because of the idea which is connected with the absoluteness of its power. What then are we to say, when we hear it asserted, that the Assembly of North Carolina surpassed them in power, and can do what they cannot? It may be said, that the Assembly are the only judges of the existence of the necessity, which justifies the assumption of private property for public uses. If this be true, then the pre-requisite of public necessity is no restriction of their power; for in their judgment it may exist, when in the opinion of all others it does not; and thus a wrong committed against the rights of an individual, would be sanctified by the wrong judgment of the oppressor. Whatever respects the power of the legislature, must be judged of by those who are to determine the conformity of its acts, to the powers delegated by the people; and when it is said that public necessity must precede their power to affect the rights of private property, and that they have done so without such necessity, whether it did exist or not, must be determined by some other persons than themselves. *Before the act is done*, either by the intervention of a Jury, as in the case of public roads; or by some other known mode, recognized by the laws and constitution of this country: and *after it is done* by the opinion of those Judges who are appointed to watch over the constitution, and are sworn to reject all unconstitutional acts. Then supposing this to be the case of an individual, how does it appear that the public necessity demands that seizure of property, which the act in question contemplates? It is not to be found in the public records, nor in the public history of the country; no verdict establishes it; nor is it even alleged in the preamble of the act: but above all, not a word of *compensation* is any where mentioned in it. It appears to be a seizure without necessity, without cause, and without compensation; and is not justified by the right of eminent do-
main, belonging to sovereignty; because it has not
(67) observed the restriction to which the right is subjected.

Is it then justified by any thing we find in the constitution of this State? And it seems to me that there is no part of the constitution of our State, which allows to the Legis-

lature a right to divest the citizen, or any corporation or set of citizens, of the rights of private property. There is a clause in our constitution, particularly applicable to this subject.—Bill of rights, section 10: "no freeman ought to be taken, imprisoned, or *disseized* of his freehold, *liberties* or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, *liberty* or property, but by the law of the land." I will presently proceed to remark upon all the material parts of this section; but before doing so, let us notice the effects of a similar, but much less explicit provision, in the constitution of a sister State. It is contained in the 1st, 8th and 11th articles of the declaration of rights of Pennsylvania, and in the 9th and 46th sections of the constitution of that State. The Legislature of Pennsylvania had passed an act to divest certain persons of titles acquired under the existing law and to place titles in others: and this brought on the question, whether the law was agreeable to the constitution, and if not what was the consequence of its disagreement therewith. And after defining what is a constitution, the learned Judge who presided, discussed the question now under consideration. He defined a constitution thus: "It is the form of government delineated by the mighty hand of the people in which certain fixed principles of fundamental laws are established. The constitution is certain and fixed: it contains the permanent will of the people, and is the supreme law of the land. It is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it. What are Legislatures? Creatures of the constitution: they owe their existence to the constitution: they derive their power from the constitution. It is their commission, and therefore all their acts must be conformable to it, or else they will be void. The constitution is the work or will of the people themselves, in their (68) original sovereign and unlimited capacity. Law is the work or will of the Legislature in their derivative or subordinate capacity: the one is the work of the Creator and the other of the creature. The constitution fixes limits to the exercise of the Legislative authority, and prescribes the orbit within which it must move. Whatever may be the case in other countries, yet in this there can be no doubt that every act of the Legislature, repugnant to the constitution, is absolutely void. The late constitution of Pennsylvania declares the rights of conscience, that elections be by ballot.

Could the Legislature annul these articles respecting religion, the rights of conscience and elections by ballot? Surely no. As to these points, there was no devolution of power. The authority was purposely withheld, and reserved by the people to themselves. If the legislature had passed an act declaring that in future there should be no trial by jury, would it have been obligatory? No. It would have been void for want of jurisdiction or constitutional extent of power. The right of trial by jury is a fundamental law made sacred by the constitution, and cannot be legislated away. The constitution of a state is settled and permanent, not to be acted upon by the temper of the times, nor to rise and fall with the tide of events. I hold it to be a clear position, that if a Legislative act oppugns a constitutional principle, the former must give way and be rejected on the score of repugnance. I hold it to be a position equally clear and sound, that in such a case, it will be the duty of the court to adhere to the constitution, and to declare the act null and void. The judiciary in this country is not a subordinate but a co-ordinate branch of the government." He then comes to the point more immediately the subject of our present consideration. "Those passages," says he, "adverting to the before mentioned clauses of the constitution of Pennsylvania, "declare that the right of acquiring and possessing property and having it protected, is one of the natural, inherent and unalienable rights of man. Men have a sense of property; property is (69) necessary to their subsistence, and correspond to their natural wants and desires; its security was one of those objects which induced them to unite in society. No man would become a member of a community in which he could not enjoy the fruits of his labor and industry. The preservation of property then is a primary object of the social compact, and by the late constitution of Pennsylvania was made a fundamental law. Every person ought to contribute his portion for public purposes and public exigences; but no one can be called upon to surrender or sacrifice his whole property, real and personal, for the good of the community, without receiving a recompense in value. This would be laying a burden upon one individual which ought to be sustained by the society at large. The English history does not furnish one instance of this kind; the Parliament, with all its boasted omnipotence, never committed such an outrage upon private property; and if they had, it would

have served only to display the dangerous nature of unlimited authority. It would have been an exertion of power and not of right; such an act would be a monster in legislation, and would shock all mankind The Legislature, therefore, had no authority to make an act, divesting one citizen of his freehold and vesting it in another, without just compensation. It is inconsistent with the principles of reason, justice, and moral rectitude; it is incompatible with the comfort, peace and happiness of mankind; it is contrary to the principles of social alliance in every free government; and lastly, it is contrary to the letter and spirit of the constitution. In short, it is what every one would think unreasonable and unjust in his own case.

"The next step in the line of progression is, whether the Legislature had authority to make an act divesting one citizen of his freehold and vesting it in another, even with compensation? That the Legislature in certain emergencies had authority to exercise this high power, has been urged from the nature of the social compact, and from the words of the Constitution; which says, that the house of represen-
(70) tatives shall have all other powers necessary for the Legislature of a free state or commonwealth, but they shall have no power to add to, alter, abolish or infringe any part of this constitution. The course of reasoning on the part of the defendant may be comprised in a very few words. The despotic power as it is aptly called by some writers, of taking private property, when state necessity requires, exists in every government; the existence of such power is necessary; government could not subsist without it; and if this be the case it cannot be lodged anywhere, with so much safety as with the Legislature. The presumption is that they will not call it into exercise except in urgent cases, or cases of the first necessity. There is force in this reasoning. It is, however, difficult to form a case, in which the necessity of a state can be of such a nature, as to authorize or excuse the seizing of landed property belonging to one citizen and giving it to another citizen. It is immaterial to the state in which of its citizens the land is vested, but it is of primary importance, that when vested it should be secured, and the proprietor protected in the enjoyment of it. The constitution encircles and renders it an holy thing. The present case is a case of landed property vested by law in one set of citizens, and attempted to be divested for the pur-

pose of vesting the same property in another set of citizens. It cannot be assimilated to the case of personal property taken and used in time of war, or famine, or other extreme necessity; it cannot be assimilated to the temporary possession of land itself, in a pressing public emergency on the spur of the occasion. In the latter case, there is no change of property, no divestment of right; the title remains, and the proprietor, though out of possession for a while, is still proprietor and lord of the soil. The possession grew out of the occasion and ceases with it. Then the right of necessity is satisfied and at an end; it does not effect the title, is temporary in its nature, and cannot exist forever. The constitution expressly declares that the right of acquiring possession and of protecting property, is natural, inherent
(71) and unalienable It is a right, not *ex gratia* from the Legislature, but *ex debito* from the constitution. It is sacred, for it is further declared that the Legislature shall have no power to alter, abolish or infringe any part of the constitution. The constitution is the origin and measure of the Legislative authority. It says to the Legislature, thus far shall you go, and no farther; not a particle of it shall be shaken, not a pebble shall be removed. Innovations are dangerous; one encroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the constitution destroyed. Where is the security? Where is the inviolability of property, if the Legislature, by a positive act, affecting particular persons only, can take land from one citizen, who acquired it legally, and it vest in another? The rights of private property are regularly protected and governed by general, known and established laws; and decided upon by general, known and established tribunals. Laws and tribunals are not made and created on an instant exigency, or an urgent emergency to serve a present turn, or the instant of a moment: their operations and influence are equal and universal. They press equally on all. Hence security and safety, tranquility and peace; one man is not afraid of another, and no man afraid of the Legislature.

"It is infinitely wiser and safer to risque some possible mischiefs, than to vest in the Legislature so unnecessary, dangerous and enormous a power as that which has been exercised on the present occasion; a power that according to the full extent of the argument, is boundless and omnipo-

tent; for the Legislature judged of the necessity of the case, and also of the nature and value of the equivalent. Such a case of necessity and judging too of the compensation, can never occur in any nation. Singular indeed and untoward must be the state of things that would induce the Legislature, supposing they had the power to divest one individual of his landed estate, merely for the purpose
(72) of vesting it in another, even upon full indemnification, unless that indemnification be ascertained in the manner I shall mention hereafter.

"But admitting that the Legislature can take the real estate of A. and give it to B. on making compensation; the principle and reasoning upon it go no farther than to shew that the Legislature are the sole and exclusive judges of the necessity of the case in which this despotic power should be called into action. It cannot on the principles of the social alliance or of the constitution, be extended beyond the power of judging upon every existing case of necessity. The Legislature declares and enacts that such are the public exigencies or necessities of the state as to authorize them to take the land of A. and give it to B. The dictates of reason and the eternal principles of justice, as well as the sacred principles of the social contract and the constitution, direct, and they accordingly declare and ordain, that A. shall receive compensation for the land. But here the Legislature must stop; they have run the full length of their authority and can go no further. They cannot constitutionally determine upon the amount of the compensation or value of the land; public exigencies do not require; necessity does not demand, that the Legislature should of themselves, without the participation of the proprietor or intervention of a jury, assess the value of the thing, or ascertain the amount of the compensation to be paid for it."

Here I will stop, though the judge continues to make many other remarks of great importance. Let us pause now a little and ruminate on the sentiments here delivered. They are the genuine effusions of a mind devoted to liberty and ardently anxious to proclaim its true principles to the world. It seeks to recommend them by shewing these principles in their native simplicity; and are they not worthy in the most exalted degree of the admiration of every citizen? Would to God I could exhibit them in their most engaging form! How soon should I succeed in repelling the attempts that

are made to cover them in obscurity! How soon
(73) would they be enshrined in the temple of our hearts, and guarded by the affections of the people from every danger.

"*No freeman ought to be deprived of his property but by the verdict of a jury or the law of the land,*" is a part of the clause to be remarked on, which immediately respects the private rights of individuals. Other parts of it I shall presently shew, respect the property of corporations as well as the personal liberty of the citizen. There is no doubt but the convention intended this clause as a restriction upon some of the branches of the government, which might otherwise use the powers prohibited. And what branch of the government was so much to be dreaded as the Legislature? The authority of the Executive is too confined to have given cause for apprehension, and the authority of the Judges is here asserted, as I shall presently prove, not restrained or diminished. The things here prohibited cannot be done but in courts of justice regularly constituted, and proceeding according to the known and steady modes of trial, used and practised in all cases. I have heard it argued, that as the Legislature can make the law of the land by passing an act for that purpose, that therefore this clause of the bill of rights, if taken as restrictive of their power, is of little or no effect. And can there be a stronger argument to prove that the term *law of the land*, has some other meaning? Would the Convention, that wise body of men, when perfecting the most important instrument that ever came under the consideration of a deliberative body, have intended to restrain the future Legislature, in matters of the most momentous concern, by a provision which they might render nugatory at pleasure? Is it any way consistent with the dignity of that body or that noble love of liberty which characterised them to attribute to them such language as this? These are powers too dangerous to be entrusted with the Legislature, and they shall not exercise them; but if they pass an act for the purpose, they may exercise them! The words *law of*
the land, therefore, mean something other than an
(74) act of the Legislature. If we resort for its meaning to the history of the times in which it was at first used in national instruments, we shall discover its genuine signification. It was first used in the 29th article of the magna charta of England, extorted by force from the King,

and explicitly declaring the rights of the people in instances in which he had formerly violated them. It declared, not that these rights could not be forfeited at all, but that they could not be forfeited at the will and pleasure of the executive, nor in other manner than by a fair trial in a court of justice by jury, where the facts were disputed, or where the facts were not disputed by such other modes as were agreeable to the law of the land or recognized by it. In either of which cases, the judgment of the regular tribunals of the country must be pronounced before the party could lose his rights. This was what was then and is now meant by the term *law of the land.* Sir Edward Coke, in his 2d Institutes, page 50, expounds this sentence to mean *due process of law.* In Shower's Parliament Cases and Hargrave's preface to C. upon Littleton, it is expounded to refer to such cases as are not triable by the judgment of one's peers. And Sullivan, page 491 and page 493, explains it to mean modes of proceeding to judgment in a court of justice legally constituted; which modes are prescribed by law, and take place in cases where the trial by jury cannot be used; for instance, if the party plead guilty or will not appear, or suffer judgment by default, or if there be a demurrer upon the pleadings of the parties where all matters of fact are truly stated and admitted by both parties, or where the court passes judgment for a contempt committed in the face of the court. In page 515, Mr. Sullivan says, no freeholder shall be disseized of his freehold but by the verdict of a jury or the *law of the land, as upon default, not pleading or being outlawed.* The meaning then of the term we are considering, was that a man should not be deprived of his freehold, &c. but by the judgment of a *court of justice* regularly constituted and authorised to decide what the law is, and to pronounce it in cases coming before them: which court shall ascertain facts by the verdict of a jury,
(75) where proper, or where that would be improper by such other means as the law has appointed. How different is this from the idea which makes every act of the Legislature a law of the land, and vests in them the arbitrary and despotic power of prostrating all those rights so dear to mankind whenever they please! The term "law of the land" had a precise legal meaning when used by the convention, and signified the lawful proceedings of the *proper tribunals* of the country. How much more for the advantage of the citizen is it, that this should be the meaning of

the constitution than the other before adverted to! If a court of justice injures an individual from unjustifiable motives, the Judge who injures him may be impeached and removed from office; or he may carry his case before a superior tribunal; but who shall procure him redress against the Legislature? The experience of ages evinces this truth, that the judiciary generally acts with coolness and reason; but it is known to all persons of political experience, that the best and most enlightened men when placed in large assemblies, will so far partake of the heats of the moment, as frequently to concur in measures, which in their calm and retired moments they find much cause to regret. Had the Assembly the powers which are expressly denied them by this clause of the Constitution, there is reason to fear that many would be the victims of the indiscreet exercise of them. Whose property would be safe, or whose life, if an Assembly, infuriated by the opposition of party, as in the times of Cæsar and Pompey, or inflamed by artful accusations, or otherwise roused to act against individuals obnoxious to the public, could deprive them of either without further ceremony than that of passing an act for the purpose, and without more responsibility than to the tribunal of their own consciences? Such times of trouble may come upon us as they have come upon other nations, and it is the interest as well as the duty of every good man to shut up as far as possible every avenue to cruelty, injustice and persecution, for we know not upon whom the evil is to fall. In such a state of things, with no bridle upon the malignant passions, how often should
(76) we see the mask of patriotism assumed as the prelude to sacrifice! how often should we see our best citizens sinking under the weight of unprincipled persecution! Who is there in the least acquainted with the excesses into which numerous bodies are apt to run, that would be willing to see the dangerous power I am contending against, vested in the Legislature. May I never see it yielded to them; for then will my country be covered with the mantle of mourning, and the spirit of confiscation, like that which appeared to Brutus, will follow on the footsteps of her patriots! Thank God, no man in North Carolina can be deprived of his life or property but by the regular judgment of a lawful court, who cannot oppress because they cannot originate any law of themselves, but can act upon those made by others. It is sometimes argued that the Constitution did not mean to

hinder the Legislature, but all other persons and bodies of men from meddling with the individual rights specified in this 10th article, but that unlimited powers may be safely intrusted with the Legislature. Answer. The Convention clearly thought otherwise; for the 24th section of the Bill of Rights prohibits the passing of any *ex post facto* law, and why? doubtless from an apprehension, that if not prohibited to exercise such a power, it would be used to the injury of individuals. It was equally necessary and essential to liberty, that the property of individuals and their personal liberty should be guarded against the encroachments of the Legislature. This 10th section furnishes that guard, or it is not furnished at all; and this is a consideration which gives additional strength to the argument that this 10th section acts as a limitation upon the powers of the Legislature. As to private property, therefore, I man venture to affirm it is beyond the reach of the Assembly, and cannot be taken from the owner by any act they can pass for the purpose.

Neither can they take away the property of a *corporation*. It is remarkable that in the 10th section of the Bill of Rights, the word *liberty* twice occurs, once in the plural and
(77) again in the singular; *no freeman ought to be disseized of his liberties, &c. or deprived of his liberty but by the verdict of a jury or the law of the land.* A *disseisin* of liberties has a legal and technical meaning, well known to lawyers to be altogether distinct from the deprivation of personal freedom or the power of going whither we please; it regards property and its possessor, while the other phrase, *deprived of his liberty*, regards his freedom from unjust confinement. *Disseisin* of liberties, must, in the opinion of the convention, mean something different from *deprivation of liberty*, otherwise it would not have been used in the same clause. It is a term which peculiarly signifies those privileges and *possessions* which corporations have by virtue and in consequence of the instruments which incorporate them. It is defined in 2 Bl. Com. 37, and Sullivan page 516, commenting upon the word *liberties*, used in the 29th article of the Magna Charta, from whence it has been translated into our Bill of Rights, says "it signifies the privileges which some of the subjects, whether single persons or bodies corporate, have above others by the lawful grant of the King, as the chattels of felons or outlaws *and the lands* and privileges of corporations." It means therefore in our Constitution the *possessions and privi-*

leges of corporations, and in conjunction with the other words of that article, amounts to this: that the possessions of a corporation, like those of an individual, shall not be taken away but by the verdict of a jury or the judgment of a court of justice. If then the Trustees of the University be considered in the light of individuals, or of a common corporation, the property which they had acquired could not be affected by any act of the Legislature; nor could it be taken from them, but by the judgment of some proper court, having sufficient jurisdiction, and proceeding according to the known and established law of the land.

And if so, I would ask, is the University distinguished to its disadvantage from other corporations? or is there any circumstance which renders its property less sacred than (78) that of an individual or common corporation? It is certainly a correct idea, that where the Assembly are directed by the people in their constitution, to do any special act, and they do it accordingly, the Assembly are to be considered in relation to that act, as the attornies of the people, appointed to do it, and consequently, that the act itself is to be considered as the *act of the people:* In like manner as a deed executed by my attorney, in my name, is my act and deed and *not his.* Thus if a Judge or Attorney General is to be appointed, the Legislature as the attornies or agents of the people elect him; but when he is elected, he is the officer of the people not of the Assembly, and cannot be turned out of office by them. How is the case of the University different in principle from the case here put: The 40th section of the Constitution, directs that "A school or schools shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters to be paid by the public as may enable them to instruct at low prices, and all useful learning shall be prompted and encouraged in one or more Universities." Now, when the Legislature have, pursuant to this direction, erected and established an University, have they any more power over it, than they have over the judges? is it not as much the work of the people as if they had established it themselves by the constitution, without the agency or intervention of the Assembly? surely it stands upon the same basis as the Legislature itself does. It is as much the will of the people, that there should be an University, and that it should continue, as it is that there should be a Legislature. When the Legislature endowed it, they

did so as the organs of the people, and they cannot avoid the gift, before they have received an authority from the people, as express for its dissolution, as they had for its establishment. It may be said, the Assembly are directed to establish schools, and one or more Universities; but not to endow them, and that therefore they alone and not the people, have given the escheated and confiscated lands to the Uni-
(79) versity. I answer, whenever a principal thing is directed to be done, all the necessary means of doing it are given to the agent. An University cannot be established without funds, and therefore it is necessarily implied that they are to provide funds for it, as well as pass a law for bringing it into existence. When the assembly accordingly pointed out the escheated and confiscated property for this purpose; it from that moment became a gift of the people, ratified through the medium of their organ the Legislature; which none but the people assembled in convention can resume. It has been said this is a public institution for public purposes, and therefore is subject to the power of *the Legislature*, which is intrusted with the superintendance of all other public concerns within this state:

I answer, the *University* like the *seat* of government is instituted for public purposes; but like that, is ordained by the constitution for this very reason, that it may not be subject to the vicissitudes of legislative opinion. The Legislature may regulate all things which pertain to the seat of government, but they cannot abolish it. So it is with respect to the *University*, they cannot abolish it, nor do any act which has a direct tendency to that end, such as taking away their funds. All that I need insist upon, however, is this: that they cannot abolish the University itself—a position which none will deny. Then it is on the same footing as other corporations, and the 10th article of the bill of rights secures all its property under the words "no freeman shall be *disseised of his liberties*," &c. but by the law of the land. To avoid this consequence, it must be assumed, not only that the University is under the government of the Assembly, but also that its *existence* is dependant on their pleasure; for if like other corporations, its existence is independent of the Legislature, then so is its property, for that is secured by the same words which secures the property of other corporations. If the idea were correct, that they who can create can destroy, it would answer no purpose to the advocates for the power of the Assem-

bly; unless they could also shew that the University
(80) is a creature of the Assembly. It is a creature of the people, who have used the Assembly as an *agent* to effectuate their will; which having once done, their authority upon this subject has ceased forever. The convention intended the *University* should be a *permanent* institution; and therefore they have not left it to the discretion of the Legislature, but as a matter of the utmost moment; they have inserted it in the constitution; and directed its creation, to the end that being a *constitutional* and not a *legislative establishment*, it should not be liable to those changes, which time produces in the conduct of Legislatures.

To say the least, the University is a corporation, as independent as other corporations are, and of course entitled to be as secure against the encroachments of the Legislature upon its property and effects. But considering it as established by the people, and rendered sacred by a place in our constitution, for the very purpose of perpetuation, it seems impossible to doubt upon the subject before us, or to run the risque of mistake, in pronouncing, that the Assembly have no right to interfere with its property of any kind. It is not true that whoever can create can destroy. In England the King can create and usually does create corporations; but he cannot destroy them at pleasure. My lord Coke, in his II Reports, page 99, gives us the reason. No freeman says he, of a corporation can be removed, but upon conviction by course of law; for *he adds* it is provided by Magna Charta, C. 29, that no one shall be disseized of his liberties, but by the judgment of his peers or the law of the land; and 4 Report 57, proves that the king who created, can no otherwise proceed to the dissolution of a corporation, than by a due course of law, and by obtaining a regular judgment for that purpose. The same doctrine is held, 1 Bl. Com. 485. Then it does not follow that because the Legislature could create, therefore it could destroy the University and take away its property. But it does follow that if the words used in Magna
Charta, as restrictive of the power of the executive,
(81) are used also in our bill of rights as restrictive of the power of the Legislature, that they must confine the Legislature here in the same manner as they do the executive in England; and consequently that the Legislature cannot interfere with the University, otherwise than by submitting to the judiciary of the country, whether or not they

have been guilty of any such acts as will in law amount to a forfeiture of their property, or to a dissolution of the body, constituted for the superintendance of its affairs. Upon this view of the case I submit to the court that the law in question is against the constitution and void.

LOCKE, *Judge*, delivered the opinion of the court.—The Legislature of North Carolina in the year 1789, granted to the Trustees of the University "all the property that has heretofore or shall hereafter escheat to the state." Ch. 21, Sec. 2. And by another act passed in the year 1794, they also granted, "The confiscated property then unsold." Ch. 3, Sec. 1. By an act passed in the year 1800, they declared, "that from and after the passing of this act, all acts and clauses of acts, which have heretofore granted power to the Trustees of the University, to seize and possess any escheated or confiscated property, real or personal, shall be and the same is hereby repealed and made void.

"*And be it further enacted*, That all escheated or confiscated property which the said trustees, their agents or attornies have not legally sold by virtue of the said laws, shall from hence revert to the state, and henceforth be considered as the property of the same, as though such laws had never been passed." Ch. 5.

The Trustees of the University in pursuance of the powers vested in them by the act of 1789, have brought this suit, to recover the possession of a tract of land escheated to the state, before the passing of the repealing act in the year 1800. The defendants have pleaded this repealing act in bar,
(82) by which they allege the power of the trustees to support this action is entirely destroyed. It is therefore now to be considered how far the Trustees have title under the act of 1789, and in the next place, how far they are divested of that title by the repealing act of 1800.

To determine the first question, it may be necessary to take into view the objections stated to the title of the Trustees, independent of the operation of the repealing act, and these are two: first, that no title to escheated lands vests in the state until an inquisition or office found; and secondly, that if the state had title, yet the Trustees have derived none by the act of 1789, because the state attempted to convey the right by act of Assembly and not by grant as required by the 36th section of the Constitution. With regard to the

first objection, the court think it a sufficient answer to say, that on this subject the law has been supposed to be long settled, as this objection has been made in almost every suit heretofore brought by the Trustees of the University, and always overruled. The court approve of the decisions upon this point, and will observe the ancient and wise maxim "*stare decisis.*" 2 Black. 245, 2 Co. Rep. 52.

As to the second objection, the words of the constitution are, "all commissions and grants shall run in the name of the State of North Carolina and bear test and be signed by the Governor," &c. It seems to be a fair and clear exposition of this part of the constitution to say, that when the state conveys land by grant, the grant shall have the requisites prescribed, to-wit, run in the name of the state, bear teste and be signed by the Governor, &c. and that all grants otherwise authenticated shall be void. It became necessary that the officer, whose duty it shall be to sign and authenticate grants, should be pointed out, and that their form and substance should be ascertained, in order to give uniformity to such grants and to avoid that variety which would be produced by the judgment of different officers. But the court sees nothing in this clause restricting the Legislature to (83) this single mode of conveyance; they are left free from any control in the mode or manner of transferring their property, unless they should adopt the one pointed out in the constitution, and then the form and ceremony are prescribed. This opinion is warranted not only by the expressions contained in the clause itself, but by the many and repeated acts of Assembly passed, since the making of the constitution, for the purpose of transferring property. Many of these acts have been mentioned and referred to by the counsel for the lessors of the plaintiff. We are therefore of opinion that the land in question vested in the state without an inquisition or office found, and that the Legislature were competent to pass the interest in the same to the Trustees of the University by the act of 1789; and that the Trustees have a good and valid title, unless the operation of the repealing act of 1800 has destroyed it.

The operation of this act is next to be considered; and it may be necessary to premise, that the people of North-Carolina, when assembled in convention, were desirous of having some rights secured to them, beyond the control of the Legislature, and these they have expressed in the bill of

rights and the constitution. The preamble to the constitution states among other thing that "we the representatives of the freemen of North-Carolina, chosen and assembled in Congress for the express purpose of framing a constitution, under the authority of the people, most conducive to their happiness and welfare, do declare, &c." Section 13th directs the General Assembly to elect several officers of state. Section 15th, directs the election of a Governor. Section 38th, directs, that there shall be a Sheriff, Coroner or Coroners and Constables in each county. It became necessary for the Legislature to appoint these officers or to pass such laws as would secure to the people such officers as would carry this form of government into effect. The framers of this instrument appear to have been well acquainted with the importance and necessity of education, and lest this object might escape the attention of the Legislature or be by them neglected, section 41st declares, "That a school (84) or schools shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters paid by the public as may enable them to instruct at low prices; and all useful learning shall be encouraged and promoted in one or more Universities." By this section as strong an injunction was imposed on the Legislature to establish an University as by the preceding clauses to appoint the several officers of government; these objects seem to be regarded by the framers of the constitution with equal solicitude; they have therefore in the same imperative style declared that there shall be an University, and that there shall be a governor, leaving to the Legislature to make such appropriations and create such funds for the endowment of the institution as would be sufficient to effect the purposes for which it should be established. In the year 1789, the Legislature obeyed this constitutional injunction and made an appropriation of escheated lands and appointed Trustees for the management of the concerns of the institution. By the act of 1800, the Legislature declared that this property should be taken from the Trustees and revert to the state. Is then this last act authorised by the constitution, or does it destroy a right which that instrument gave to the people, a right highly esteemed in all civilized nations, that of educating their youth at a moderate expense? a right of acquiring knowledge and good morals, which have always been

deemed most conducive to the happiness and prosperity of a people?

Some light will be thrown upon this subject by examining the nature of corporations, how property can be taken from them, and how they can be dissolved. Corporations are formed for the advancement of religion, learning, commerce or other beneficial purposes. They are either aggregate or sole, and created by grant or by law. When they are once erected, they acquire many rights, powers, capacities and some incapacities, 1 Black. 495, as 1st, to have perpetual succession; and therefore all aggregate corporations have necessarily the power of electing members (85) in the room of those who die, to sue and be sued and to do all other acts as natural persons. 2d. to purchase lands and to hold them for the benefit of themselves and successors. 4th. to have a common seal. 5th. to make bye-laws for the better government of the corporation. These corporations cannot commit crimes, although their members may in their individual capacity. The duties of those bodies consist in acting up to the design for which were instituted. Let us next enquire how their corporate property can be taken from them and how they may be dissolved. A member may be disfranchised or lose his place by his own improper conduct, or he may resign. A corporation may be dissolved by act of Parliament, which is boundless in its operation; by the natural death of all its members, in case of an aggregate corporation; by surrender of its franchises into the hands of the king, which is a kind of suicide; by forfeiture of its charter through negligence or abuse of its franchises, in which case the law judges the body politic to have broken the condition on which it was incorporated, and therefore the incorporation to be void; and the regular course is to bring an information in the nature of a *quo Warranto*, to enquire by what authority the members now exercise their corporate power, having forfeited it by such and such proceedings. 1 Black. 485, 3 Black. 263, None of these prerequisites have been done in the present case. We are then led to enquire into the soundness of an argument greatly relied on by the defendant's counsel, that those who create can destroy. The Legislature have not pretended to dissolve the corporation, but to deprive them of a part of the funds, that were deemed to be vested in them, and to transfer those funds to the state. In England the king's consent

to the creation of any corporation is absolutely necessary, either given expressly by charter or by act of Parliament, where his assent is a necessary ingredient or implied by prescription. 1. Black. 472, 473. The king may grant to a subject the power of erecting a corporation; and yet it is the king that erects, the subject is but the instrument. 1 Black. 474. Where there is an endowment of lands, the
(86) law distinguishes and makes two species of foundation; the first, *fundatio incipiens*, or the corporation; in which sense the king is the founder of all Colleges and Hospitals; the other, *fundatio proficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and who gives them is the founder: 1 Black. 431. The constitution directed the General Assembly to establish this institution and endow it; then it would seem from the principle upon which all this doctrine is predicated, that the constitution and not the Legislature had erected this corporation; the Legislature being only the agent or instrument, whose acts are valid and binding when they do not contravene any of the provisions of the constitution. We view this corporation as standing on higher grounds than any other aggregate corporation; it is not only protected by the common law, but sanctioned by the constitution. It cannot be considered that the Legislature would have complied with this constitutional requisition, by establishing a school for a month or any determinate number of years, and then abolishing the institution; because the people evidently intended this University to be as permanent as the Government itself. It would not be competent for the Legislature to declare that there should be no public school in the state, because such an act would directly oppose that important clause in the constitution before mentioned. But if the Legislature can deprive the University of the appropriated and vested funds, they can do that which will produce the same consequences; for deprive the institution of funds already vested and refuse to make any additional appropriations, there never can exist in the state a public school or schools; and thus the Legislature may indirectly effect that purpose, which if expressed in the words before mentioned they could not do. Besides, when the Legislature have established an University, appointed Trustees and vested them with property which they were to hold in trust for the benefit of the institution, have they not discharged their duty as the agents

of the people and transferred property which is afterwards beyond their control? From that moment the Trus-
(87) tees became in some measure the agents of the people, clothed with the power of disposing of and applying the property thus vested to the uses intended by the people, but over which the power of the Legislature ceased, with the discharge of the constitutional injunction; unless it might be necessary in the course of time to make other or further appropriations to continue and support the institution; and this we consider to be their duty at all times, when such necessity shall exist, that the expectation of the people, as expressed in the constitution may not be disappointed.

But one great and important reason which influences us in deciding this question, is the 10th section of the bill of rights, which declares "that no freeman ought to be taken, imprisoned, or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land." It has been yielded on the part of the defendant that if the Legislature had vested an individual with the property in question, this section of the bill of rights would restrain them from depriving him of such right; but it is denied that this section has any operation on corporations whose members are mere naked Trustees, and have no interest in the donation, and especially on a corporation erected for a public purpose. It is also insisted that the term, "Law of the Land," does not impose any restrictions on the Legislature, who are capable of making the Law of the Land, and was only intended to prevent abuses in the other branches of government. That this clause was intended to secure to corporations as well as to individuals the rights therein enumerated, seems clear from the word "*liberties*," which peculiarly signifies those privileges and rights which corporations have by virtue of the instruments which incorporate them, and is certainly used in this clause in contradistinction to the word "*liberty*," which refers to the personal liberty of the citizen. We therefore infer that by this clause the legislature are as much restrained from affecting the property of corporations, as they are that of a pri-
(88) vate individual, unless the "Law of the Land," should receive the construction contended for on the part of the Defendant. It is evident the framers of the constitution intended the provision as a restraint upon some

branch of the government, either the Executive, Legislative, or Judicial. To suppose it applicable to the executive would be absurd on account of the limited powers conferred on that officer; and from the subjects enumerated in that clause, no danger could be apprehended, from the Executive Department, that being entrusted with the exercise of no powers by which the principles thereby intended to be secured could be affected. To apply to the Judiciary, would if possible, be still more idle, if the Legislature can make the "*Law of the Land.*" For the Judiciary are only to expound and enforce the law and have no discretionary powers enabling them to judge of the propriety or impropriety of laws. They are bound, whether agreeable to their ideas of justice or not, to carry into effect the acts of the legislature as far as they are binding or do not contravene the constitution. If then this clause is applicable to the legislature alone, and was intended as a restraint on their acts, (and to presume otherwise is to render this article a dead letter,) let us next inquire, what will be the operation which this clause will or ought to have on the present question. It seems to us to warrant a belief that members of a corporation as well as individuals shall not be so deprived of their liberties or properties, unless by a trial by Jury in a Court of Justice, according to the known and established rules of decision, derived from the common law, and such acts of the Legislature as are consistent with the constitution—although the Trustees are a corporation established for public purposes, yet their property is as completely beyond the control of the Legislature, as the property of individuals or that of any other corporation. Indeed, it seems difficult to conceive of a corporation established for merely private purposes. In every institution of that kind, the ground of the establishment is some public good or purpose intended to be promo-
(89) ted; but in many, the members thereof have a private interest, coupled with the public object. In this case, the trustees have no private interest beyond the general good: yet we conceive that circumstances will not make the property of the Trustees subject to the arbitrary will of the Legislature. The property vested in the Trustees must remain for the uses intended for the University, until the Judiciary of the country in the usual and common form, pronounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or a dissolution of their body.

The demurrer must therefore be allowed, and the plea in bar overruled.

HALL, Judge—*Contra.*—A question of more importance than that arising in this case, cannot come before a court. It is nothing less than one branch of the government undertaking to decide, whether another branch of the same government has or has not transcended its constitutional powers; a question which in its discussion should at all times command the best energies of the head and heart. When this shall be the case, although a difference of opinion may sometimes exist, it will be an honest one, and cannot fail to find its remedy in mutual tolerance and concession. But well convinced, indeed, ought one person to be of another's error of judgment, before he passes sentence of condemnation on it, when he reflects that each has given the same pledges to support the constitution. Before a law enacted by the legislature should be pronounced unconstitutional, it ought to appear to the court to be palpably so: if an honest doubt can be entertained on the subject, we owe it to ourselves as well as to the legislature, to carry it into effect. Far be it from me, if it were in my power, to damp that laudable and honest zeal, which characterised the argument of the defendant's counsel; it cannot be too much extolled or too widely circulated: but I speak it with deference to the opinions of my brethren, that I think, occasions might occur, when its influence would be more happily felt and lead to
(90) more useful and correct results. In the opinion which I have formed on this question I am probably mistaken, as I have the misfortune to differ from the rest of the court: but from the best consideration I can give to it, I am bound to say, that I believe the law in question is not unconstitutional.

I feel no disposition to controvert many things urged in argument by the defendant's counsel; he has had recourse, however, to one argument, which I think militates against him. It is drawn from the 41st section of our constitution, which is in the following words: "a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged and promoted in one or more Universities." He endeavors to

strengthen his general proposition, namely, "That any law taking away the property of an individual or a common corporation is unconstitutional," by stating, in addition, that there was a constitutional obligation on the Assembly to set apart funds for the support of the University; and if it were constitutional and right for them to do so, it is unconstitutional and wrong to take away those funds. If the framers of the constitution intended by that section that the Legislature should establish one or more Universities and schools, and vest in them certain funds, which might be deemed sufficient at the time for the support in a constitutional view; if it were intended that by doing this, the Legislature had completely discharged their duty, and had nothing more to do with such schools and Universities, whatever misfortunes might afterwards attend them, there might be something in the argument. I think, however, this section of the constitution was intended for a very different purpose. It became the duty of the Legislature, created by and acting under that constitution, to establish seminaries of learning, with salaries to the masters, &c., and afterwards to support and cherish them as long as the constitution shall exist. If by accident the funds set
(91) apart for their support should be destroyed, it would be the duty of the Legislature to endow them with others. The Legislature is the constitutional guardian of these seminaries of learning, and should at all times keep them under their inspection and control. This is a duty which they cannot delegate or transfer to any one, and can only end with the constitution itself. Suppose then, that property should be given to the Trustees of the University (whom I consider in no other light than as agents of the Legislature,) which property was not very productive, but sufficiently so for the support of the University; and afterwards it were to become so much so, that one-third of the profits arising from it, would be adequate to the wants of the institution, who would have a right to the surplus? Let us reverse the case and suppose the profits of property given to the Trustees to decrease or fail altogether; would it not be the duty of the Legislature to provide other funds or give other property which would be sufficiently productive? I think it would. If so, can it be doubted, but that the surplus profits would be at the disposition of the Legislature? It may be said that the Trustees have no surplus funds, that

the profits of their property are not equal to the wants of the institution. That may be the case; but who is to judge of it? I answer, not this court: the constitution gives it no such power. The Legislature must be the judge. It would be going too far to say, that there was a constitutional obligation on the Legislature to do a certain thing, and that this court and not the Legislature should decide when it was properly done. If, then, the Legislature must judge how large the funds of the University ought to be, add to them when they are too small and take from them when too large, this court are not the proper judges in such cases; and if not, how can we undertake to say that the law in question is unconstitutional? It cannot, I think, be denied that the General Assembly have a right to take from the Trustees property of which the University stands in no need, and that for the best of reasons: because they are bound to fur-
(92) nish it with additional funds, as those which it already possesses may decrease, or as its wants may increase. I have said that the General Assembly cannot delegate this constitutional power; that is that they cannot, by giving to the Trustees any quantity of property or any given sum of money, exonerate themselves from the trust and confidence which the constitution reposed in them. It is true they may appoint Trustees as their agents to act for them, and their Trustees or agents are amenable to them for their conduct: they have a naked authority without any interest. The law can have no bearing upon them as individuals; it can only affect them in their public character as Trustees. And how is it to do this? They were entrusted with property for the purpose of supporting an University in conformity with the directions of the constitution, and the General Assembly are about to take this property from them, which they contend they have no right to do. If the Assembly are bound in any event to furnish funds to support the University, they have a right to take away surplus funds. If it be said that the property in question is not of that description, I answer, who are to judge of this, but the General Assembly, on whom there is a constitutional obligation to establish and superintend an University. On the Trustees, no such obligation is imposed; they are the mere agents of the Legislature; and as well might it be said that any other citizens equal in number to the Trustees should be placed paramount to the Legislature. I therefore can see no analogy between this

case and that of a gift made to an individual or to an ordinary corporation. My opinion upon the whole case, is founded upon the provisions of the constitution, and regarding the Trustees as mere agents for the management of the concerns of the University under the direction of the Legislature, I think the demurrer should be overruled and the plea in bar sustained.

CASES

ARGUED AND DETERMINED IN THE

COURT OF CONFERENCE,

OF

NORTH CAROLINA.

DECEMBER TERM, 1805.

(93)

The Heirs of ANTHONY B. TOOMER *v.* the heirs of HENRY TOOMER.

From Wilmington.

In making partition, so much of the ancestor's lands acquired by him after making his will, as are conveyed to a child by way of advancement, are to be valued according to their worth at the time of the conveyance; and the residue of the lands be valued at the time of the ancestor's death.

Henry Toomer made his will in the year 1789, in which after several devises and bequests, he directed that the remainder of his estate, real and personal should be divided among his four children, Anthony, John, Lewis and Elizabeth. The testator died in 1799, having, after the making of his will acquired other lands and real estate not mentioned in his will. After the making of his will he gave to his son Anthony B. by way of advancement, a plantation called the Brick-Yard plantation. Anthony B. Toomer died in 1805, and the petitioners being his children and heirs at law claimed a share of the real estate of said Henry Toomer, which was acquired after said will was made, and filed a petition praying for a partition thereof. They insisted, 1st. that they were not bound to bring the said Brick-Yard plantation into Hotch-Pot, because the said Henry Toomer did not die intestate, and that the rule relative to bringing

lands into Hotch-Pot holds good only in those cases where the ancestor dies totally intestate. 2dly. That if this plantation should be brought into Hotch-Pot, it ought to be valued at the time of the gift.

The defendants contended that Henry Toomer did die intestate as to those lands which he acquired after making his will, and which were not disposed of by the same within the words and meaning of the act of 1784, ch. 22: that the Brick-Yard Plantation ought to be brought into Hotch-Pot and valued according to its worth at the time partition is made, or at the time of the death of Henry Toomer.

BY THE COURT.—The Brick-Yard Plantation ought to be brought into Hotch-Pot and valued at the time it was conveyed to Anthony B. Toomer. The other lands purchased by Henry Toomer after making his will ought to be valued at the time of his death.

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(94) SUTTRELL'S EXECUTORS *v.* DRY'S EXECUTORS.

From Wilmington.

The court will not grant a new trial upon an affidavit of one of the Jurors that he did not assent to the verdict.

The plaintiffs brought an action of debt against defendants, upon a bond given on the 17th February, 1777, by defendant's testator, for two hundred pounds money of North Carolina, payable on the 7th February next ensuing. A verdict was rendered for the plaintiff and upon motion of defendant's counsel a rule was obtained upon the plaintiff to shew cause why a new trial should not be granted, upon the ground that one of the jury who tried the cause had not assented to the verdict; and the affidavit of the Juror was offered to the Court, setting forth that he did not consent to the verdict; that he thought the money mentioned in the bond ought to have been scaled according to the scale of depreciation and that the full value called for in the bond ought not to have been given.

BY THE COURT.—Applications like the present for new trials have always been rejected. Were they to be listened to by the court, they would open a door for much corruption. The rule for a new trial must therefore be discharged.

FRYER *v.* BLACKMORE'S ADMINISTRATOR.

From Wilmington.

A. being administrator of B. is summoned as a garnishee in a case pending in the county court. He is examined and an issue made up and found against him, he prays an appeal, but does not give bond for the appeal until the next Term, in consequence of which the appeal is dismissed—a writ of certiorari will lie to remove the cause to the Superior Court.

The defendant was summoned as a garnishee, in a cause pending in the County Court; he was examined and an issue was made up and tried between him and the plaintiff, and the jury found in favor of the plaintiff at April term, 1804. The defendant prayed for an appeal to the Superior Court, but did not execute an appeal bond until July term following. The record was transmitted to the Superior Court and the appeal was there dismissed, because the appeal bond had not been executed at the proper time: at the same term in which the appeal was dismissed, the defendant obtained a writ of certiorari to have the record certified to the
(95) Superior Court, and upon the return of this writ, his counsel moved to have the cause placed on the trial docket, which being objected to, the cause was sent to this court upon the question, whether the writ of certiorari was the proper remedy in this case.

BY THE COURT.—The writ of *Certiorari* is the proper remedy for the defendant in this case, and we concur in the opinion expressed by the Judge upon the hearing of this cause in the court below, that the cause should be placed on the trial docket.

ARTHUR BELL *v.* BENJAMIN BELL.

From Fayetteville.

The defendant having pleaded in abatement that the plaintiff resided in the state of Georgia, and that he the defendant resided in the district of Newbern and ought not to be compelled to answer the suit in Fayetteville district court, the plaintiff replied that one A. B. had the beneficial interest in the suit, and that he resided in Fayetteville district. The defendant demurred to this replication. Demurrer overruled.

This was an action on the case, to which the defendant pleaded in abatement that the plaintiff resided in the state

of Georgia, that he the defendant resided in the district of Newbern, and this not being a local action that he ought not to be compelled to answer thereto in any other court than that of the district in which he resided. To this plea the plaintiff replied that the beneficial interest in the suit was in Joshua Bell, and not in Arthur Bell, the nominal plaintiff; that the said Joshua Bell was at the time of issuing the writ in this case an inhabitant of and resident in the county of Anson within the district of Fayetteville, &c. To this replication the defendant demurred, and the plaintiff having joined in demurrer, the case was sent to this court for the opinion of the Judges.

BY MACAY, TAYLOR AND LOCKE—*Judges.*—Let the demurrer be overruled with costs.

HALL—*Judge*—Contra.—Anthony Bell is the plaintiff of record, and the act of 1777, ch. 2, directs that "where the plaintiff shall reside beyond seas, or in a different state, the suit shall be brought to the court of the district where the defendant resides, and where suit is brought otherwise than is therein directed, it may be abated, on the plea of the defendant." A court of law will not take notice of the trust between Anthony Bell and Joshua Bell, and recognize the latter as plaintiff when the record declares that the former is plaintiff.

(96)

MARY JONES *v.* WILLIE JONES' EXECUTOR.

From Halifax.

A widow dissents from her husband's will, and claims a distributive share of the crops growing on lands devised. She files a bill in equity against the executor for an account of the crops and a distribution of them, but charges no fraud, &c. Bill dismissed on the ground that a court of Equity has no original jurisdiction over the case. Widow's remedy is prescribed by the act of 1791, ch. 22..

Willie Jones being seized and possessed of large real and personal estates, made his last will and testament, and therein devised all his lands to his two sons in severalty, some tracts to the one and some tracts to the other, and in a subsequent, separate and distinct clause, devised the crop either growing or in the granaries, together with all the

residue of his personal property, to be divided between his said two sons, when the eldest arrived at age. He appointed Allen Jones Executor of his will, who after his death proved the same and undertook the execution thereof. Mary Jones the widow, dissented from the will and claimed a distributive share of the crops growing on the lands of her husband at the time of his death; the executor resisted the claim upon the ground that the crops passed with the lands on which they were growing to the two sons under the devises in the will. The widow filed a bill in Equity for an account and distribution of the crops, and the case was sent to this court for the opinion of the Judges.

BY THE COURT.—If the widow's claim to a distributive share of the crops growing on the lands of her husband at the time of his death be well founded (upon which point we shall give no opinion) she must seek to enforce it in the way pointed out by the act of 1791, ch. 22. A court of Equity cannot exercise any original jurisdiction over the claim which she sets up. There is no charge of fraud in the executor, nor such matter of account as will author-
(97) ize the court to take cognizance of the case—the bill must therefore be dismissed.

THOMPSON *v.* TATE.

From Hillsborough.

The vendor of goods is liable for affirming the goods to possess a quality which would increase their value, if it turns out that the goods do not possess this quality, although the vendor did not know that the affirmation was false.

Rule for a new trial on the ground of misdirection by the presiding judge. The question of law arising on the trial of this cause, was, whether the vendor of personal property affirming at the time of the sale that the property sold has any particular quality, which if it possessed would increase its value, and it turns out that it does not possess this quality, be liable to an action on an express or implied warranty, although he did not know such affirmation to be false? Upon the trial the Judge instructed the jury that the vendor was liable, and

BY THE COURT.—Upon this question there can be no doubt: the vendor is clearly liable, and the rule for a new trial must be discharged.

CARDWELL'S HEIRS *v.* BRODIC.

From Hillsborough.

Judgment of execution against the real estate of a deceased debtor in the hands of the heirs and devisees, reversed, because it was not found that the executrix had fully administered, had no assets or not sufficient to satisfy the creditor's demand.

This was a writ of error brought by the plaintiffs to reverse a judgment recovered against them by defendant in Granville county court. John Brodic the defendant brought an action of trespass on the case against Mary Cardwell, Executrix of Thomas Cardwell's will, and the said Executrix failing to make any defence, Brodic took judgment by default, and damages were assessed upon a writ of enquiry. A *Fieri Facias* was sued out against the goods and chattels of Thomas Cardwell deceased, in the hands of his executrix the said Mary, which was returned by the Sheriff to No-
(98) vember term, 1805, of Granville county court, having the sheriff's indorsement thereon "that no goods nor chattels of Thomas Cardwell were to be found." Brodic then sued out a *scire facias* against the heirs at law and devisees of Thomas Cardwell deceased, to shew cause why he should not have judgment of execution for his debt and costs, against the real estate of the said Thomas Cardwell deceased in the hands of the said heirs and devisees. Upon this *scire facias*, judgment was rendered in favour of Brodic; and some time afterwards the said heirs and devisees brought a writ of error to reverse this judgment. They assigned for error, 1st. that it did not appear from the record and proceedings in the cause, that the Executrix Mary Cardwell had fully administered the estate of her testator, or that she had no assets, or not sufficient to satisfy the recovery of the defendant in error in the suit brought against her. 2nd. That the jury did not find upon the trial of the said suit, that the said Executrix had fully administered, or had no assets or not sufficient to satisfy the recovery aforesaid. The defendant in

error having pleaded that there was no error in the proceedings in the cause, &c. the case was sent to this court for the opinion of the Judges.

BY THE COURT.—The act of 1784, ch. xi, was passed to remove doubts, "which were entertained whether the real estates of deceased debtors in the hands of their heirs or devisees, should be subject to the payment of debts upon judgments obtained against the Executors or Administrators; and to direct the mode of proceeding in such cases." It is declared in the 2d section of this act, "that in all cases at law, where the Executors or Administrators of any deceased person shall plead fully administered, no assets, or not sufficient to satisfy the plaintiff's demand, and such plea shall be found in favour of the defendant, the plaintiff may proceed to ascertain his demand and sign judgment; but before taking out execution against the real estate of the deceased debtor, a writ or writs of *scire facias* shall and may issue, summon-
(99) ing the respective heirs and devisees of such deceased debtor; to shew cause why execution should not issue against the real estate for the amount of such judgment, or so much thereof as there may not be personal assets to discharge; and if judgment shall pass against the heirs or devisees, or any of them, execution shall and may issue against the real estate of the deceased debtor, in the hands of such heirs or devisees, against whom judgment shall be given as aforesaid." The Legislature intended that the real estates of deceased debtors should not be subject to the payment of their debts, until the personal estate was exhausted; and the court have no power to award execution against the real estate in the hands of the heirs or devisees, until "it shall be found upon the plea of the Executors or Administrators, that they have fully administered, have no assets, or not sufficient to satisfy the creditor's demand." The judgment, therefore, rendered against the plaintiffs in error was not rendered according to the mode of proceeding directed by the Legislature: it is erroneous and must be reversed.

DICKENSON *et al. v.* STEWART'S EXECUTOR.

From Newbern.

The probate of a will may be set aside after the term expires at which the will was proved and a second probate be ordered by the same court. The court will look to all the circumstances of the case, to aid its discretion in ordering a second probate.

This was a petition to the county court of Pitt, to set aside the probate of a paper writing which had been proved in said court as the last will and testament of James Stewart deceased, and to contest the said will upon an issue to be made up under the direction of the court. The petitioners were the heirs at law and next of kin of the said Stewart. Joel Dickenson, one of the petitioners, resided in the town of Greensville where the court was held, and on the first day of the term was informed by John Spier the executor, that he would have the said will proved on that day, which was accordingly done, and the court continued to sit for four days afterwards. Dickenson neither caveated the probate
(100) nor during the term made any application to the court upon the subject. William H. Williams, the other petitioner, resided in Fayetteville and had no previous notice of the said probate, but was informed of it shortly afterwards. The will was proved at November term 1802, and at February term 1804, the petitioners filed their petition to set aside the probate of the said will and to require the Executor to exhibit the said will for probate again in the said court. The case was taken to the Superior Court of Law for Newbern District, and by that court was sent to the court of conference upon the question "whether the probate of a will in the usual form, can be set aside after the term has expired at which it was proved, and a second probate ordered by the same court; and if so, at what length of time it may be done. The case was argued by Gaston for the petitioners, and by Harris for the defendant.

BY THE COURT.—We are of opinion that the probate of a will in the usual form may be set aside after the term has expired at which the will was proved, and that a second probate may be ordered by the same court. As to the length of time at which this may be done, that must depend upon the particular circumstances of the case. The court will look to all circumstances which can aid its discretion in ordering a second probate.

HOWARD *v.* PERSON'S ADMINISTRATORS.

From Halifax.

Rule for a new trial entered, *nunc pro tunc*, the clerk having omitted to enter it at the proper time.

This was an application to the court to amend the record, by entering a rule for a new trial, now as of the time when it ought to have been entered.

Howard having recovered a judgment against the Administrators of Thomas Person deceased, the defendants by their counsel moved for a rule upon the plaintiff to
(101) shew cause why a new trial should not be granted. The clerk omitted to enter the rule. The presiding judge took time to consider whether the rule should be made absolute; and having some doubts upon the case, he declined giving an opinion until he could consult with his brethren of the bench at the next court of conference. He addressed a letter to the clerk, informing him of his intention to consult his brother justices at the next court of conference upon the rule for a new trial, and directing him to forbear to issue an execution until the opinion of the judges could be known. The judges were of opinion that a new trial should be granted; but in the mean time Howard the plaintiff, applied to the clerk for an execution, and as the rule for a new trial was not entered on the record, the execution was issued. The Administrators of Person filed an affidavit setting forth in substance the above facts, prayed for a supersedeas to stay the execution, and that the clerk of Halifax Superior Court (in which the court cause was tried) might be directed to enter the rule for a new trial, now as of the time when it ought to have been entered. The question arising upon this affidavit and this application to amend the record was sent to this court.

BY THE COURT.—Let the Clerk of Halifax Superior Court enter the rule for a new trial, now, as of the time when it ought to have been entered; and let the judgment which he has entered upon the verdict in this case be set aside.

JUDGES OF THE SUPREME COURT

OF

NORTH CAROLINA,

DURING THE YEAR 1806.

SPRUCE MACAY, Esquire,
JOHN LOUIS TAYLOR, Esquire,
JOHN HALL, Esquire,
FRANCIS LOCKE, Esquire.

HENRY SEAWELL, Esquire, Attorney General.
EDWARD JONES, Esquire, Solicitor General.

By an Act of the last Session of the General Assembly, the name and style of the Court of Conference were altered to that of the "SUPREME COURT OF NORTH CAROLINA."

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA.

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(102) ARRINGTON, Adm'r of Phillips, *v.* COLEMAN.

From Halifax.

Administrators not liable for costs incurred in a suit brought by their intestate, and prosecuted by them after his death. Where executors or Administrators sue in *Auter Droit*, they are not liable for costs *de bonis propriis*, they are liable where they sue in *their own right*, although they name themselves Executors or Administrators.

Where they sue in *Auter Droit* and fail, having no assets, costs are lost, unless they give bond and security for the costs, and then the security is liable.

On motion to dismiss the Supersedeas obtained in this case by Arrington, Administrator of Phillips, it was ordered that the case be sent to the Court of Conference upon the question, whether an Administrator is liable for costs incurred by his intestate in carrying on a suit at law, before he (the administrator) became a party to the suit; and whether he is liable for costs incurred in the time of his administration; and out of what estate or effects the said costs are to be paid in case there be no assets of the intestate?

LOCKE—*Judge*—delivered the opinion of the court. The rule with regard to costs in England seems to be accurately laid down in 2nd Bac. Ab. 446, and in the cases there referred to. Executors and Administrators when plaintiffs pay no costs, for they sue in *Auter Droit*, and are but trustees for the creditors; they are not presumed to be sufficiently cognizant of the personal contracts of those whom they represent, and are therefore not within the statutes or acts of Parliament relative to costs. Wherever they sue in *Auter Droit*, they pay no costs; but if they bring suit in their (103) own right, they shall pay costs, though they name themselves Executors or Administrators; for this is

but surplusage. Salk. 314, Elwis *v.* Mocato. To apply this rule to the present case, it would seem clearly to result that the Administrator is not liable to pay, *de bonis propriis*, the costs incurred during the time of his intestate being a party or during his own time. But the court think he is liable and ought to pay both, out of the assets in his hands, if any such remain. For all the costs incurred, during the pendency of the suit became a debt for which the estate of the intestate ought to be responsible.

In cases, therefore, where Administrators sue in *Auter Droit* and fail, having no assets of the deceased wherewith the costs can be discharged, the court are of opinion that the costs are lost, as there is no person properly liable to pay them; unless such administrators should give bond and security for payment of costs, and then such security is liable on the principle of the case determined by this court at this term, Hostler's Administrator *v.* Benjamin Smith.

HOSTLER'S ADMINISTRATOR *v.* SMITH.

From Wilmington.

An executor appeals from the judgment of the county Court and enters into bond with security. The bond is binding on the parties; and on a *Scire Facias* against the security founded on the appeal bond and on a judgment in the superior court against the Executor, judgment given in favor of the plaintiff.

The plaintiff brought suit against the executors of John Howell in the county court, and obtained judgment; by which judgment assets were considered to be in the hands of the defendant sufficient to satisfy the plaintiff's demand. The defendants appealed to the superior court, and the defendant Benjamin Smith became bound in an appeal bond as their security under the acts of Assembly requiring appellants to give security. In the superior court judgment was again rendered in favor of the plaintiff, one of the executors afterwards died, and the plaintiff sued out a *Scire* (104) *Facias* against Smith the security, for the appeal to shew cause why judgment should not be entered against him for the debt and costs recovered against the appellants. The case was sent to this court for the opinion of the Judges, on the question, whether the plaintiff is enti-

tled to have judgment entered against the defendant upon this *Scire Facias.*

This case was argued by Jocelyn for the plaintiff and by Haywood and Duffey for the defendant. The principal points relied on by defendant are noticed in the following argument of

Jocelyn for the plaintiff. It is contended, 1st. That whenever an executor or administrator appeals from the judgment of the county court, he is bound in the same manner with every other appellant to give bond with security to prosecute his appeal with effect, and to perform the Judgment of the superior court: and 2ndly, That if he is not bound to give bond with security, yet if he does, the bond is good and binding upon the parties.

As to the first point, it must be admitted that when the Legislature permitted a defendant to appeal, they were competent to prescribe the terms on which the appeal should be granted, and possessed the constitutional power of laying executors and administrators under the same restrictions, which were imposed on others in cases of appeal. The question then occurs, has the Legislature by express words or by necessary inference and a fair construction of the act of 1777, directed that executors as well as others shall give bond with security, before they can be entitled to an appeal. The 82nd Sec. of that Act is expressed in broad and comprehensive terms. "When any person or persons, either plaintiff or defendant, shall be dissatisfied with the sentence, judgment or decree of any county court, he may pray an appeal from such judgment, sentence or decree, to the superior court of law of the district wherein such county court shall be; but before obtaining the same shall enter into bond
(105) with two sufficient securities, for prosecuting the same with effect, and for performing the judgment, sentence and decree, which the Superior Court shall pass or make thereon, in case such appellant shall have the cause decided against him." *In Words,* then, this clause manifestly includes the case of Executors as well as others; and they must be comprehended within its true meaning, unless there be some imperious principle of law which exempts them from the operation of words of such general import. But it is alleged, that some of the acts of Parliament relative to writs of error in England, are worded in the same general terms with our act of Assembly, and yet on the con-

struction of those acts, the courts of that country uniformly held that executors were not compelled to give security, in prosecuting writs of error; that of course our courts are bound to give to our act of Assembly the same construction. It is admitted that the English courts did consider executors exempt from the operation of those acts, although the words are general; but yet it appears that Parliament did not consider the question as entirely at rest or free from doubt: for by an act of the 16 and 17 Car. 2nd, regulating writs of error, &c., it is expressly enacted, that for the future executors should not be obliged to give security; and it is to be remarked that in all subsequent cases on the subject, this act of the 16 and 17 Car. 2nd, has been relied on as forming the principal or only exemption in favor of executors.

But there are some material circumstances attending our act of 1777, which did not attend the acts of Parliament previous to the act of Car. 2nd and which afford ground for a different decision. In all those acts of Parliament executors are not once mentioned or alluded to, and it is not easy to decide, whether it was or was not the intention of the Legislature, that Executors should be included by general
(106) expressions. In our act of 1777, it is manifest that the case of executors was immediately within the contemplation of the Legislature, and in all cases where it was intended that they should be relieved from the operation and binding force of ordinary compulsory process, they are exempted by *express words*. Thus in the 16th section of the act, it is enacted that executors shall not be obliged *to give bail*. Afterwards comes the 82nd section which declares that *all persons* appealing shall enter into bond, &c. and the act which gives Equity jurisdiction to the Superior Court, provides that *security* shall not be required of executors in cases of writs, by which defendants are held to bail. If our act of 1777, like the English statutes, had not the case of executors under consideration; if they were not named nor alluded to in the act, we might be left to infer that such cases were to be governed by former decisions and the plain principles of the common law, and that the Legislature did not intend to interfere. But it seems to follow as a necessary consequence, that as the Legislature had the case of executors under consideration, and enacted that in writs of capias, executors should not be obliged to give bail, they certainly would have declared also, that they should not be required to give secu-

rity in cases of appeal, if it were intended they should be relieved from the burthen and inconvenience of giving security.

Let this proposition be examined and compared with the principles laid down by the defendant's counsel. They contend, that however general or comprehensive the words of a statute may be, yet executors are not bound to give bail on mesne process, are not compelled to offer security in writs of error, and are not obliged to enter into bond with security in cases of appeal. Why then the reason or necessity of that provision contained in the 16th section of the act of 1777, which exempts executors from bail, or of that clause (107) which relieves them from personal arrests in equity proceedings? Or of that section of the act of the 16 and 17 Car. 2d by which executors are not bound to give security in writs of error? All these clauses in favour of executors must appear impertinent and unnecessary, to say the least of them, if no additional validity is to be drawn from the circumstance of their being inserted in the body of these several acts. The inference to be drawn from the whole of the act of 1777, taken together is, that executors are bound to give security, where security is required, in the same manner as other persons, unless they are exempted, by express words; and their being exempted in some cases, by the same act, is to be received as conclusive evidence that they are bound in all other cases in which they are not expressly exempted. It is also to be remarked, that this objection has never been taken from the passing of the act in 1777, until the present case; and although general opinion and long acquiescence do not form the law, yet they are strong evidences of what the law is. What motives of policy or convenience can *now* make it necessary to disturb a question, which since the year 1777, has been considered as completely settled by continued practice and usage? Why at *this time* affix a meaning to that act, which it never claimed and which it is not necessary to give it.

In the second place, admitting that upon principles of law and the fair construction of our act of Assembly, executors are not obliged to enter into bond with security in cases of appeal, yet, as in the present case a bond was given, in which the defendant became security, it is contended that the bond is good and binds the defendant. That such is the law will appear from 2 Ld. Ray. 1459, and 2 Strange 745. In these

cases judgment was rendered against an executor in the Common Pleas: he obtained a writ of error and gave bond and security to prosecute the writ. Judgment was affirmed in the King's Bench, and afterwards a *scire facias*, as in
(108) the present case, issued against the security. An objection was taken by defendant's counsel, that the bond was utterly void, inasmuch as by the act of 16 and 17th Car. 2d, executors were not bound to give security in writs of error. But the court held, that although executors were not obliged to give security in such cases, and were entitled to writs of error without security; yet as he had given bond, it was binding upon all the parties, and judgment was given for the plaintiff. These cases are expressly in point.

The defendant's counsel have clearly shewn that in England executors are not obliged to give bail; are not bound to give security in prosecuting writs of error; and also, that an heir cannot be arrested for the debt of his ancestor. All this is admitted; but our act of 1777, is essentially different, in some important particulars, from the British statutes and admits or rather requires a different construction. The defendant's counsel have dwelt with much earnestness upon the great inconvenience and hardship to which executors will be subjected, if they should be compelled any longer to give bond and security in appeals: and it is intimated that cases may exist, in which executors may be so situated as to be relieved from the payment of the money mentioned in the bond, and yet the security made liable, and what is worse, can have no remedy against the executors for whom he became bound. If cases of such hardship can be made to appear by any combination of possible circumstances, the court would do well to hesitate, before they give a construction to a statute that would produce such singular mischief—but the cases presented to us for examination, will appear either to be fanciful or susceptible of easy explanation. In England an executor plaintiff is personally liable to costs in cases of *non pros.* And where he sues as executor when he
(109) might have sued in his own name. In every instance therefore where he is personally liable, there can be no hardship in obliging him to give security. So where the executor is defendant, the costs of the judgment are claimed *de bonis propriis.* But if in cases of appeal an executor is bound to enter into bond with security, in what does the risque either of the executor or security consist?

In the Superior Court the trial is *de novo*, and if it be found that the executor has assets, the judgment of course will be satisfied out of those assets, and the security to the appeal bond can be in no danger. If it be found that the executor has administered the assets and that nothing remains in his hands, the verdict will necessarily be in his favor and the security be exonerated. But a third case may arise in which policy requires that a bond should be demanded of an executor and the security be made liable; and that is where the executor has assets to discharge the judgment at the time it is rendered in the County Court, but wastes them and becomes insolvent before judgment is obtained in the Superior Court. According to every principle of justice the security ought in such case to be made liable; for without his voluntary aid the executor might not have been able to take up his appeal, and the creditor might have obtained the benefit of his judgment before the executor had sufficient time to waste the assets and his own estate.

What case can be put in which the security will run any risk which he ought not to encounter? Defendant's counsel have stated several cases in which they suppose peculiar hardship might fall on the security. One is where judgment is affirmed against the executor and his security in the Superior Court, and assets found in his hands; execution issues, but in the mean time the negro slaves, which compose the assets, die or are killed: they allege that the executor will be liable *de bonis propriis*, and in default of those the security to the appeal will be answerable. To this
(110) it may be answered, that if other modes of relief fail, equity would protect an executor, in no fault, against the injurious consequences about to result from a case of such singular hardship. But in truth, such a case cannot well occur in this country. An executor is bound by statute to sell the property of his testator at a credit of not less than six months, taking bonds, &c., for the purchase money; and these monies when recovered from the amount of assets in his hands. If a negro should die or be killed before the sale, his value is not inserted in the inventory; and as the law directs the personal estate to be sold, or so much thereof as will pay the debts of the testator, if an executor acts legally, he cannot be made liable for accidents of this nature.

It is also urged by way of illustration and argument, that

in a suit against two executors, the judgment must be against both, although one only possessed himself of the assets, and that the security to the appeal may in such case suffer. If it be true that at common law the judgment must be joint, although one executor only took the assets into his hands (which in general is not admitted) yet nothing is more certain than that equity would relieve an executor so hardly situated, who had acted fairly and had been in no fault; his security would consequently share in all the benefit of this relief. If the other executor had received the assets to satisfy the judgment, the security would be in no danger; but if he had wasted the estate in the mean time the security ought to be answerable. After considering the cases put by defendant's counsel and every other that can present itself to the imagination, we shall not find one where the executor is legally exonerated or equitably relieved and the security left liable to suffer: not one instance of danger to the security where the executor either has assets to satisfy the judgment, or has paid them away in the fair course of his administration, or has been deprived of them by some acci-
(111) dent which he could neither foresee nor prevent. In one case, indeed, he may be answerable, in default of the executor's ability to pay, that is, where the executor, after an appeal, wastes the assets and becomes insolvent. Here he ought to be made liable; and this instance is a strong argument to shew the propriety and necessity of compelling executors to give security in all cases of appeal.

In some of the states executors equally with administrators are obliged to give bond and security for the faithful application and administration of the assets. In this state they are not required to give such bond. If an indulgence not expressly granted to executors by the act of 1777, is to be allowed, and after the justice of the demand has been ascertained by a judgment, the executors may still harrass a creditor by an appeal without security, it would seem that an unreasonable advantage is put into the hands of a malicious or fraudulent executor. In those cases where it is evidently for the interest of the estate to obtain an appeal, the executor can never be at any loss for security and the security can never be injured.

As to the second point made for the plaintiff in this case, the defendant's counsel, without being able to deny the weight of the authorities cited from Raymond and Strange, have

endeavoured to distinguish those cases from the present: they contend that as by the act of 16 and 17 of Car. 2d, executors were not obliged to give bond in writs of error, the bond was entered into *voluntarily* and ought to bind the parties; but in the present case the appellant under the prevailing usage of the country was *compelled* to give bond, and the court ought now to declare the bond entered into, under such circumstances of compulsion, entirely void. But if this argument
(112) had any weight when applied to the executors, how can it apply to the present defendant? There was no compulsion as to him; with him the act was purely voluntary as in the case cited from Lord Raymond. When he became a party to the appeal bond, he well understood its terms and the obligations it imposed, and voluntarily placed himself in the situation in which we find him.

The defendant's counsel have attempted to weaken the force of the authorities cited, by presenting to the consideration of the court the case of Waller, decided in one of our Superior Courts. That case was a little peculiar in its circumstances. Judgment had been obtained in the County Court; an appeal was prayed, and bond and security given. The appeal bond was not made out according to the form prescribed by the act of Assembly; it set forth in the condition, that if the appellant did not prosecute his appeal with effect, the obligors should be liable to pay *twelve and an half* per cent. upon the sum recovered. This bond was declared by the court to be void. The principles of these cases are widely different, and the decision in Waller's case in no respect militates against the opinion of the court in certain cases cited In Waller's case, the bond was held to be illegal on account of its informality, and the unwarrantable terms of the condition, such as no person was bound to submit to, and such as could not be legally imposed. But in the present case there is no objection to the *form* of the bond or to the *condition*. The question is, whether a defendant executor is bound to give *any bond at all;* and if he is not so bound, whether if he does give bond, it shall not bind the parties. Upon a full view of this case it is submitted to the court whether the best policy does not require, and whether our act of 1777 either by express words or by necessary implication, will not justify an opinion that executors are equally

bound with others to give bond and security in all cases of
(113) appeal; but if not, whether as the defendant did enter into the bond, it shall not be binding upon him.

LOCKE, *Judge*, delivered the opinion of the court.—In deciding the question whether the plaintiff is entitled to judgment upon the *scire facias* against the defendant, it is not necessary to determine a previous question made by the counsel for the parties and argued at much length, to-wit, whether executors or administrators, when appellants, are bound to enter into bond with security: for we are of opinion that whether they are thus bound or not, if they enter into bond and give security, such bond is obligatory upon the parties. The cases cited from 2d Ld. Ray. 1467, and 2 Strange, 1745, establish this principle beyond all doubt. The case of Waller *v.* Pittman, relied on by defendant's counsel, is not applicable to the present case. There the bond executed by the appellant and his securities contained none of the substantial parts prescribed by the act of Assembly: it was totally variant, and on that account was declared by the court to be insufficient to ground a judgment on. In the present case the bond is in perfect conformity with the act, and in itself complete, but is attempted to be avoided on the ground that the executors, who appealed, were not bound to give security. The cases cited from Lord Raymond and Strange shew that the bond cannot be avoided on this ground. Let judgment be entered for the plaintiff.

SIMMONS *v.* RATCLIFF.

From Halifax.

On the abatement of a suit by the death of the plaintiff, execution for the costs ought not to be issued, until a scire facias has issued to the representatives of the plaintiff.

The plaintiff instituted an action of trespass *quare clausum fregit* against the defendant and pending the suit he died. The suit was not revived by his representatives, and a *fieri facias* was issued against the property of the plaintiff
(114) for the costs. A motion was made to set aside this execution, on the ground that no *scire facias* had

issued against the plaintiff's representatives, to shew cause why the execution should not be issued. The case was sent to this court upon the question whether a *scire facias* ought not to have been issued against the plaintiff's representatives, before suing out the execution. And

BY THE COURT.—A *scire facias* ought to have been issued against the representatives of the plaintiff before suing out execution, and an opportunity afforded to them of making defence and pleading thereto. This execution has therefore been issued erroneously and must be set aside.

Den on Demise of GIBSON *v.* SHEARER.

From Salisbury.

Deed for lands in the actual adverse possession of another person is totally void.

The lessor of the plaintiff claimed the land in question under the trustees of the University of North Carolina; he obtained a deed for the land when Shearer the defendant was in the actual possession, claiming the land as his own. The question in the case was, whether this deed was valid?

LOCKE, *Judge*, delivered the opinion of the court.—This deed is totally void, in as much as the common law does not permit a right of entry to be transferred or sold, and for the reason assigned in Co. Lit. 214, "to avoid maintenance, suppression of right, and stirring up suits; and therefore nothing in action, entry, or re-entry can be granted over; for so under colour thereof pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth; as men to grant before they be in possession." This question has been so often decided in this state, that the court thought it had long since been at rest and would never be revived. Let judg-
(115) ment be entered for the defendant.

PERSON'S HEIRS *v.* DAVEY.

From Hillsborough.

Upon the trial of a caveat the only question is, who has the best equitable right to procure a grant for the land.

Facts known to a party before trial, but omitted to be proved upon a belief that the evidence offered was sufficient, no good reason for a new trial.

The defendant entered a tract of land lying in Person county; the plaintiffs caveated the entry, and by consent of parties the caveat was tried in court, when a verdict was found for the defendant. The plaintiffs obtained a rule for a new trial upon an affidavit setting forth, 1st. that their ancestor, Thomas Person, in his life time obtained a grant from the state for the lands in question, and therefore the jury ought to have found a verdict in favor of the caveators. 2ndly. That the said Thomas Person had purchased an improvement on said land from the first occupant, and therefore had the prior equitable right to the land; but this evidence was not produced on the trial, because the caveators conceived the grant aforesaid to be sufficient. The case was sent to this court upon the question whether the rule for a new trial should be made absolute or be discharged.

LOCKE, *Judge*, delivered the opinion of the court. Upon the trial of a caveat, the question is not, which of the parties has the better grant or title, but simply which has the best equitable right to obtain a grant. It is the peculiar province of the jury to determine this question from all the facts disclosed to them on the trial. The verdict of the jury therefore, saying, that the defendant Davey is entitled to a grant cannot impair or destroy the grant of Person's already obtained; and if his grant be valid in law, his heirs will be able to secure the land in dispute. The court therefore think that on this ground a new trial ought not to be granted, but that Davey should be permitted to obtain his grant and the parties be left at liberty to determine the validity of their respective grants by a trial in an ejectment or in such other mode as they may choose. The second reason as-
(116) signed for a new trial is insufficient, as the fact disclosed in the affidavit was known before the trial of the caveat and the proof of that fact omitted to be introduced through the negligence of the caveators. Let the rule for a new trial be discharged.

WILCOX'S HEIRS *v.* MORRIS *et al.*

From Hillsborough.

A creditor agrees with his debtor after judgment, to levy his execution on the whole of the debtor's property and purchase it in at the sale and hold it as a security for his debt; equity will permit the debtor to redeem the property.

Wilcox the ancestor being indebted to Morris in a large sum, confessed judgment for the amount of the debt, upon a special agreement that Morris should levy the execution on all his property, purchase it in at the sale and hold it as a security for the payment of his debt, and that Morris should recover the property when the debt was paid. Morris by his agent McClain purchased in the property and sold a great part thereof to purchasers for a valuable consideration without notice of this trust. Wilcox filed this bill against Morris, McClain and the sub-purchasers, in order to redeem the property sold and to have a re-conveyance enforced; also to have an account of the profits and amount of sales, charging that the whole of the debt has been paid. On the hearing of this cause three questions were reserved and sent to this court. 1st. Whether the contract between Wilcox and Morris was in the nature of a mortgage, and the property sold under the execution redeemable. 2nd. Whether an account stated and liquidated between Wilcox and Morris ought not to be set aside, on account of an imposition alleged to have been practiced on the latter in said settlement, owing to his old age and imbecility of mind. 3d. Whether the bill ought not to be dismissed as to McClain and the sub-purchasers, because the first was a mere agent and received money and conducted the business for Morris the principal, and
(117) because the latter were purchasers for a valuable consideration without trust.

LOCKE, *Judge*, delivered the opinion of the court. The contract between Wilcox and Morris was in the nature of a mortgage, and the property sold under the execution is redeemable. No particular words or form of conveyance are necessary to give to the contract the qualities of a mortgage. It may be laid down as a general rule subject to few exceptions, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or any other instrument, it is always considered in equity as a mortgage, and the estate redeemable, even though there be an express

agreement of the parties, that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons. A Court of Equity, in applying this rule to particular cases, will often ascertain the fact whether the conveyance was intended as a security for money, however absolute it may appear; and will lay hold of all the circumstances of the transaction to ascertain this fact; such as the value of the estate conveyed and the sum given therefor, the bargainee not being let into the immediate possession of the estate, his accounting for the rents and profits to the bargainor, &c. In the present case there was a special agreement in writing that the complainant should be at liberty to redeem the property when the debt was paid. We are also of opinion that the account referred to ought not to be set aside, there being no evidence of any fraud or imposition practised on Morris. The suggestion of his old age and imbecility of mind is not sufficient to set the account aside: but leave is given to surcharge and falsify the same. As to the third point, we think the bill ought to be dismissed as to the sub-purchasers without notice of the trust; but as to the representatives of McClain the agent, the bill ought to be retained,
(118) that an account may be taken of the money which he received, great part of which complainant alleges was never by him accounted for to his principal. Let this account be taken and the bill, as to sub-purchasers, without notice of the trust be dismissed with costs.

HAWKINS *v.* THE COUNTY OF RANDOLPH.

From Hillsborough.

The County Court rejected a petition for an order to lay out a public road; the petitioner appealed to the Superior Court. The appeal cannot be sustained.

The plaintiff exhibited a petition to the County Court of Randolph, for the purpose of obtaining an order to lay out a public road in said county. The court rejected the prayer of the petition and the plaintiff prayed an appeal to the Superior Court. The question submitted to this court, was whether the appeal ought to be sustained?

LOCKE, *Judge*, delivered the opinion of the court. The act of 1784, ch. 14, declares that "from time to time and at all times thereafter, the courts of the several counties in this state, shall have full power and authority to appoint and settle ferries and to order the laying out of public roads where necessary, and to appoint where bridges shall be built, and to discontinue such roads as then were or thereafter should be found useless, and to alter roads so as to make them more useful as often as occasion shall require." By this act, the power and authority to lay out public roads is vested in the County Courts: they are clothed with the power of judging where roads shall run, when or how to be changed or discontinued. When they have exercised this power and declared a public road shall be laid out, the third section of the act directs "that it shall be laid out by a jury of freeholders, to the greatest advantage of the inhabitants and the jury shall assess the amount of damages which private persons may sustain by such road passing through their land."

(119) This section directs how the order of the County Court shall be executed; but no judicial authority is vested in the jury with regard to the propriety or impropriety of such road: that power rests with the court, and when once exercised, the jury are bound to carry their order into effect. It is not necessary to examine the reasons which induced the legislature to vest the sole authority on this subject in the County Courts; it is sufficient to say, they have done so. But the reason probably was, that the County Courts had a more perfect knowledge on this subject; they are held by all the justices of the county who reside in different parts thereof, and few applications can be made for orders to lay out roads, without some member of the court being able to judge of the necessity or utility of such road. The Superior Courts would in almost all instances be compelled to form an opinion upon the representation of men who were in some way interested, or influenced by their prejudices and partialities. The act of Assembly has therefore for good reasons, given jurisdiction in such cases to the County Courts; their means of information to enable them to exercise this jurisdiction beneficially, are superior to those of any other tribunal.

The next and important consideration is, whether although jurisdiction on this subject is given to the County Courts, the party praying for the order may not appeal from their

decision and have his claim examined in the Superior Court. The act of 1777, ch. 2, sec. 82, declares "that when any person or persons, either plaintiff or defendant, shall be dissatisfied with the sentence, judgment or decree of any County Court, he or they may pray an appeal from such sentence, judgment or decree, to the Superior Court of the district where such County Court shall be." And the 99th section, provides that all persons in whose favor judgment shall be given, shall be entitled to full costs. When the Legislature have prescribed the jurisdiction of the County Courts and in several instances have declared the right of ap-
(120) peal to the party dissatisfied with their judgment, it may fairly be inferred that an appeal will never be sustained in a Superior Court, except in those instances directed by the Legislature. With regard to the subject of roads, jurisdiction over it is not given by the Legislature unless the case can be brought within the provisions of the 82 section of the act of 1777. This clause seems to be confined to causes regularly brought before the Court, where there are a plaintiff and defendant to be affected by the judgment. Is the present such a case? Who is the plaintiff and who is the defendant? Hawkins, who merely files a petition to obtain an order for laying out a road cannot be considered a plaintiff within the meaning of the act, and surely the County Court of Randolph cannot be considered as defendant, merely because in their individual capacities, they have delivered an opinion with which Hawkins is dissatisfied. This seems to be a case without either plaintiff or defendant and therefore not within the meaning of the act. To shew this more clearly, let us observe, that the 82 section of the act of 1777, requires the appellant to give bond and security to prosecute his appeal with effect, and to perform the judgment of the Superior Court. To whom ought the bond to be given in this case? Process has been served on no person; the Court are to grant the appeal and to judge of the sufficiency of the securities offered by the appellant; they cannot therefore be considered as parties defendants. Hawkins then cannot give such bond as is required, and until such bond is given, an appeal cannot be obtained. But suppose the appeal should be sustained, and the Supreme Court should order the laying out of the road as prayed for, Hawkins would be entitled to full Costs. Against whom shall judgment be entered for their

costs? shall judgment be rendered against the County Court for costs, because they have given an opinion on the subject of a road which the Superior Court have reversed? (121) this certainly cannot be done. Costs then cannot be decreed to Hawkins, although he should prevail. But the right to costs is conferred on the party in whose favor judgment is given, by the very act which authorises the appeal, and if within its provisions in one part, ought to be so in all.

But it is said there is a necessity for such provision; for that the members of the County Court might collude and refuse an order for the most useful road. If such necessity does exist, the remedy lies with the Legislature and not with the Court, whose business it is to administer and expound the law, not to make it. The appeal cannot be sustained and must therefore be dismissed.

MERRIL *v.* SLOAN.

From Salisbury.

The principle that notice to an agent is notice to his principal, does not apply to the case of surveys of entries of land made by publlic surveyors, in the discharge of their public duties. The rule applies only to cases where there is a special trust or confidence reposed in the agent at the time of the transaction, or after by the acceptance of the purchase by the principal. Entry taker's books no notice of an entry having been made.

This was a bill in Equity brought by complainant Merril against defendant Sloan for the purpose of having a tract of land conveyed to the complainant, upon the ground that the defendant had fraudulently procured a grant from the state for the said land. The bill charged that one Thomas White under whom complainant claimed, had made the first entry of the land, and the defendant having notice of this entry, entered the land and obtained the grant. The question referred to this Court was, whether defendant had notice of Thomas White's entry at any time before he obtained his grant. To shew that defendant had notice, three grounds were relied on by complainant. 1st. That the surveyor at the time he surveyed the land for the defendant, had express notice of White's entry; for White went upon the land and told him of the entry and forbade him to return the warrant and certificate of survey to the secretary of state. That the

surveyor in this respect, is to be considered the agent of Sloan the principal, and that notice to the agent is notice to the principal. 2dly. That the entry of Sloan ex-
(122) pressly described the *improvement* of one Gadbury, which was in truth the *improvement* of White, who permitted Gadbury to live thereon in consideration of his clearing some of the land and planting some fruit trees: and that this improvement was notice. 3dly. That the entry-taker's book, containing a description of the land entered was also notice, for by examining them, Sloan could easily have discovered the entry of White.

LOCKE—*Judge*—delivered the opinion of the Court. The cases cited by complainant's counsel proving that notice to an agent is deemed in law notice to the principal are not to be controverted; but whilst the Court admit the correctness of the decision in these cases, they think them inapplicable to the case now before the Court, and cannot consider the surveyor in the light of an agent of the defendant. In all cases of constructive notice, it is necessary there should be a special trust and confidence reposed in the agent either at the time of the particular transaction or after by the acceptance of the purchase by the principal, the cases cited from Equity Cases Abridged, embrace two principles. The first class of cases go to shew that if a scrivener or attorney who draws a mortgage to secure the payment of money, had notice of a prior mortgage, this shall be constructive notice to the last mortgagee. And why? Because the mortgagee selects the scrivener or attorney from his knowledge of his integrity and candor; and being one of his own choice, the law presumes that whatever is known to such attorney, will be fairly and honestly communicated to his client, and that such attorney will not suffer the friend who places this confidence in his integrity, skill and honesty, to be defrauded. The second class of cases shew, that where the father or other person, having notice that lands were contracted to be sold, purchases the lands and takes a deed to his son and heirs. Here it is said, there is no trust or confidence placed in the father by the son, and yet such notice shall affect the
son. But it is observable that here the conveyance
(123) is merely voluntary, nothing being paid by the son towards this land; and the case of Manull *v.* Manull, 2 Wills. 613, shews that if persons claiming under a breach

of trust have notice of it, they are subject to the same trust: So if the conveyance be voluntary and without valuable consideration; 3 Eq. A. B. 685. Neither of these classes of cases, in the opinion of the Court, ought to govern this case. The first ought not, because the surveyor is a public officer, to whom the individual must resort to have his business transacted, and there is no particular trust or confidence existing between the surveyor and the man who employs him as a public officer to survey an entry of land. The second ought not, because here the defendant was a purchaser for a valuable consideration, and as he states in his answer, without notice; and notice to the surveyor does not affect him, because not within the reason and grounds upon which notice to an agent is to be deemed notice to the principal.

As to the second ground taken to prove notice to defendant, to-wit: That there was an *improvement* on the land and that Gadbury was residing thereon previous to the entry and survey made by defendant; the Court have looked into the evidence upon this point and find that it was satisfactorily proved that Gadbury contracted with White to live on the land for the consideration expressed in the statement of this case; it was also proved and by the deposition of Gadbury himself, that he never considered himself the tenant of White, but that he resided on the land in his own right. The Court are of opinion, that although Gadbury made this contract with White, yet as Gadbury afterwards claimed the land in question in his own right, and there being no evidence whatever, to show that defendant ever knew this improvement to belong to White, it ought not to amount to notice to him. For on seeing the improvement and Gadbury residing thereon, his enquiries would naturally be directed to Gadbury
(124) respecting the right, and as Gadbury swears that he did not consider the improvement to belong to White, the inference to be drawn would be, that it was Gadbury's, and when he abandoned it, might well be entered by defendant without any notice of complainant's equitable title.

The Court are also of opinion that the books of the entry-taker ought not to amount to notice; first, because most entries are made in so loose and vague a manner, that they do not furnish any sufficient evidence of the precise land entered; and secondly, because all the acts of Assembly respecting titles to land, though they do not prescribe a precise and limited time for surveying and obtaining grants; yet hold

out the idea of one or two years; or at least, that the grants should issue within a reasonable time, Iredell's Revisal, 296, 293, 351, 368—It would therefore only direct the attention of the enterer to such entries as had been made within one, two or three years at most, and ought not to operate in a case like the present, when a lapse of ten or eleven years intervened between the date of White's entry and the time of his obtaining a grant, and especially as White knew of defendant's survey and could have procured a suspension of his grant, and upon a caveat had his right fairly tried by a jury. As no notice is proved on defendant, the bill must be dismissed with costs.

THE STATE *v.* STRAT.

From Hillsborough.

Perjury may be committed in answering a question that has no relation to the issue, if asked with a design to impair the credit of the witness as to those parts of the case which are material and important to the issue, particularly if the witness be cautioned to his answer.

The defendant was indicted for Perjury and found guilty, subject to the opinion of the Court on the following case.

The defendant prosecuted one Zephariah Tate and others for a riot. On the trial of the indictment the defendant was examined as a witness, and was asked, whether he did not present a gun at Zephariah Tate, or threaten to shoot
(125) him? He was cautioned by the Counsel who propounded this question, to take care how he answered it. He answered that he did not present a gun at said Tate or threaten to shoot him. He was then cautioned to take care how he answered this question, and the question was propounded to him a second time. The defendant again answered in the negative. The answer given by defendant to this question, was the perjury assigned in the indictment. The question and answer had no immediate relation to the question of guilty or not guilty on the indictment for the riot; but the question was asked in order to lay a foundation for the introduction of witnesses on the part of the defendants, proving the answer to be false, and thereby impairing the credit, which his testimony might have with the jury on

other facts which were material and important to the issue. The question for the consideration of the Court was, whether the oath taken as aforesaid, could be considered so material to the issue, as to amount to the crime of perjury?

LOCKE, *Judge*, delivered the opinion of the Court. It cannot be doubted, that if the oath be wholly foreign to the issue or altogether immaterial and by no means pertinent to the question, not tending to aggravate or extenuate the damages or fine, nor likely to induce the jury to give a readier credit or to lessen the credit to the substantial part of the evidence, it cannot amount to the crime of perjury. Hawkins in his Pleas of the Crown, 323, has put several instances to illustrate this position. "As where a witness being asked by a Judge whether A brought a certain number of sheep from one town to another altogether? Answered that he did so; whereas he had brought part at one time and part at another. Yet such witness was not guilty of perjury, because the substance of the question was, whether A did bring them at all or not, and the manner of bringing them was only a circumstance." He cites many other instances and adds, "But perhaps in all these cases, it ought to be intended that
(126) the question was put in such manner, that the witness might apprehend, that the sole design of putting it, was to be informed of the substantial part, which induced him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial: for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, which afterwards appear to be false; surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his proving to have an exact and particular knowledge of all the circumstances relating to it.

If in the doctrine here laid down, the author be correct, it would seem that the oath taken by the defendant does amount to perjury. For the question was asked for the purpose of sifting the defendant's knowledge of the substance, by examining him strictly as to circumstances; and in such a manner as to inform the defendant of this purpose, and with a design to lessen the effect of his testimony on those parts of the case which were material and important: and although

it related nothing to the merits of the cause then on trial, yet inasmuch as his giving such an answer in a thing immaterial, had such a direct tendency to lessen his credit concerning what was most material and consequently beneficial to the defence of the then defendant, equally criminal in its own nature and equally tending to abuse the administration of justice as if the matter sworn had been the very point in issue, there does not seem any good reason, why it should not be equally punishable. This case is precisely similar to the case of the *State* v *Doty*, determined some years ago in Salisbury Superior Court. One Harmon preferred an indictment against Doty for Petit Larceny; to support which there was but one witness, named Patterson. To render Patterson infamous and thereby disqualify him from giving testimony, Doty preferred an indictment against him for Larceny. Pending these prosecutions, Doty offered Pat-
(127) terson a horse, saddle and bridle to abscond and not appear as a witness against him; which offer was rejected by Patterson. On the trial of the indictment, the State *v.* Patterson, Doty was asked, if he had not made this offer to Patterson; he answered positively that he had not. For this oath, Doty was indicted, tried, convicted and punished, although the same exception was taken and solemnly argued by counsel, which is taken in the present case. The question had no relation to the Larceny, but was asked with the express design of impairing the credit of Doty's testimony on those parts of the case which were material and important. The Court believing the decision in Doty's case to be correct are of opinion that judgment should be entered for the state

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WINDOWS *v.* MITCHELL.

From Salisbury.

A. on his death bed, directed B. to go into his field to a place pointed out and get a sum of money there deposited, which in the event of A's death, B. was to divide among A's children. This is not a "donatio mortis causa" to A's children. Defendant's acknowledgment of the above facts and of his having received the money is not good evidence thereof, to vest the money in him as trustee for the use of A's children, and defeat the statute of distributions.

This was an action on the case for money had and received

to the use of the plaintiff. Adam Windows the father of the plaintiff on his death bed gave directions to the defendant to go into his cornfield to a particular place therein pointed out and get a certain sum of money which he had deposited there, and in the event of his death, to divide the money among his six children, the plaintiff being one, Mitchell the defendant went to the place pointed out and found seven hundred and one dollars, thirty-five cents. Adam Windows then made his will and therein took no notice of this money. The only evidence adduced by the plaintiff to prove the direction to the defendant to go into the field and get the money, and in the event of the death of Adam Windows, to divide it among his children; also the defendant's having received the money and the amount thereof, was the acknowledgment of the defendant, who told one of the witnesses, in addition to these facts, that he intended to discharge
(128) the plaintiff's demand. The defendant was the executor of Adam Windows' Will.

The following questions were made in this cause and sent to this Court for the opinion of the Judges. 1st. Whether the money claimed by the plaintiff can be considered as a "*donatio mortis causa.*" 2nd. Whether the defendant's acknowledgment of the facts stated in the case shall be deemed sufficient to defeat the statute of distributions and to vest the money in him as trustee for the use of Adam Windows' children; and his acknowledgment of this fact be good and sufficient evidence thereof. 3rd. Whether an action at law can be maintained for the recovery of this money, it being in the nature of a legacy?

MACAY AND HALL, *Judges*, gave judgment for the defendant on the two first points. No opinion was given on the third point.

TAYLOR, *Judge, Contra,* on both points

LOCKE, *Judge*, having been of counsel in the cause, gave no opinion.

WHITHEAD (Widow) *v.* CLINCH'S HEIRS AND EXECUTORS.

From Halifax.

Dower having been assigned to the widow upon a petition at law, Equity will not entertain a bill for the mesne profits during the detention of the dower, unless there be some equitable circumstance, such as loss of title deeds, or detention of such deeds, or a discovery is necessary. Damages for the detention of the dower are to be prayed for and recovered when the dower is allotted. If defendant to a suit at law or dower die, pending the suit, damages are lost, and dower alone recovered.

Jacob Whithead died in the year 1783, seized and possessed of a tract of land in Nash county, leaving the complainant Martha Whithead his widow; who sometime in the year 1786, filed her petition against Joseph John Clynch who was then in possession of the said tract of land, praying that her dower therein might be allotted to her. Clynch contrived to delay the hearing of the petition until the year 1794, when he died, having previously made a will and appointed executors. The petition was carried on against the heirs of Clynch until the year 1800, when judgment was
(129) rendered in favor of the petitioner and her dower in the said land was accordingly allotted to her. During the pendency of this suit, the land was possessed and the profits received by Clynch during his life and by his heirs after his death. When the writ of dower was executed, no damages for the mesne profits were recovered, owing in part to the doubt, whether as the suit was originally instituted against the ancestor and afterwards carried on against the heirs, any damages could be given, and as the act of Assembly regulating the proceedings upon petition for dower, had made no provision upon this point. Clynch died possessed of property more than sufficient to satisfy the complainant's demand, which property came to the hands of his executor. Martha Whithead the widow, filed this bill against Clynch's executors and heirs at law, praying for an account of the mesne profits, and that one third part thereof might be decreed to be paid her.

To this bill the defendants demurred and assigned for causes of demurrer that if complainant were entitled to damages, she ought to have demanded and recovered them with her dower at law; and that complainant had not shewn that she was entitled to any damages for the detention of her dower, either in law or equity. The executor assigned another cause, to-wit: That complainant's dower was recovered

from the other defendants who were the tenants in possession and that damages in dower could by law be recovered from him. The complainant having joined in demurrer, the case was sent to this court.

In support of the demurrer it was urged, that without some equitable circumstance, such as defendant detaining title of deeds, loss of such deeds, or where a discovery from the defendant is necessary, a Court of Equity will not entertain a bill for mesne profits. 2 Vern. 519. 3 Atk. 340. 1 Atk. 524, that in this case no equitable circumstances existed or were set forth in the bill. It was further urged that this being a case which originated previous to the act of
(130) 1784 which regulated proceedings in cases of dower, it ought to be decided by the law as it stood previous to the act of 1784. By this law, if the defendant in a writ of dower die pending the suit, damages are lost and judgment will be given for dower only. 2 Ba. Ab. 392, 294. And although cases are numerous where plaintiff or defendant at law, in a suit for damages, has died, it has always been conceded that damages were lost at law, and equity has never given relief. The case from 2 Brown's Ch. Rep. 620, &c., is a case which was first instituted in a court of equity, and not in a court of Law.

No damages or mesne profits were recoverable at Common Law in real actions, of which dower is one; on the principle that they were necessary to enable the tenant in possession to answer the demands of the lord. The statute of Morton, 20 Hen. III, first gave damages in Dower to Widows, and that only where the Husband died seized of the land. Co. Lit. 33, 32 b. (2)—2 Ray. 1384. 2 Ba. Ab. 392. 3 Dyer 284. & b. 33. No case can be produced where Widows whose Husbands did not die seized of the land of which they prayed dower recovered mesne profits, except two or three, which were afterwards reversed for error on that very account—no damages are prayed against a purchaser in the Husband's life time. 3 Bro. Ch. 264—and in Beenbury 57, is a case where the bill in almost every particular like the present, was on Demurrer dismissed—And

BY THE COURT—Let the Demurrer be sustained and the bill dismissed with costs.

(131) KING'S ADMINISTRATOR *v.* BRYANT'S EXECUTOR.

From Halifax.

Plaintiff having lost the bond declared on after an appeal from the judgment of the County Court, is permitted to prove the contents thereof upon the trial in the Superior Court, and to recover a judgment without amending his declaration.

This was an action of debt brought in the County Court of Northampton, and the Bond declared on was produced on the trial and the execution thereof duly proved. Verdict and judgment were rendered for the plaintiff, and the defendant appealed to the Superior Court of Law for Halifax District, subsequent to the appeal and before the trial of the cause in the Superior Court, the bond declared on was lost. No application was made to the Court to amend the declaration, and upon the trial in the Superior Court, a question arose, whether, as the declaration set forth a *profert* of the bond, the production of the bond could be dispensed with and the plaintiff be permitted to prove the contents thereof? The Jury gave a verdict for the plaintiff, and upon a rule for a new trial, the case was sent to this Court.

BY THE COURT—Let the rule for a new trial be discharged.

MUMFORD *v.* HODGES.

From Fayetteville.

The Judgment of the County Court not being lessened in the Superior Court bears ten per cent. interest up to the time of rendering judgment in the Superior Court.

This was an action of debt, and the plaintiff having recovered a judgment in the County Court, the defendant appealed to the Superior Court of Law for the district of Fayetteville; in which Court having failed to diminish the sum recovered in the County Court the plaintiff's Counsel moved for judgment against the defendant for the additional interest given by the Act of Assembly: and the question, for what space of time the judgment obtained in the County Court is to bear ten per cent. interest, was referred to this Court.

BY THE COURT—Under the Act of Assembly on this subject the judgment of the County Court is to bear interest at

the rate of ten per cent. from the time of obtaining
(132) the same in the County Court, up to the time of obtaining judgment in the Superior Court.

BYNUM & PARKER, Adm'rs of BRANCH, *v.* BOWEN BRANCH, Administrator *de bonis non* of JOHN BRANCH, deceased.

From Halifax.

A. bequeathed two negro slaves by name to his widow during life; and in a subsequent clause of his will he bequeathed "the negroes therein mentioned, Pat., King, &c. (naming them, but omitting the names of the two given to his widow during life) to five of his children." adding "that the above that are not heretofore given away shall be equally divided among his said children." The negroes in the first clause are included in the second clause of the will and after the death of the widow go to the five children—two of the children having died intestate before a distribution of the negroes was made, the next of kin cannot have a decree for distribution of their shares of the said negroes, against the administrator de bonis non cum testamento annexo of the testator until the representatives of the deceased children are made parties.

John Branch, by his last will, gave to his wife Mary "one negro fellow by the name of Curtain, also one negro girl by the name of Queen, during her natural life, and no longer:" and by a subsequent clause in his will he directed "that the *negroes therein mentioned*, Patty, King, &c. (not mentioning either Curtain or Queen) should be divided between his children, Polly, Bowen, Thomas, Norman and Rebecca, when they should arrive at age or marry, adding "that *the above* that are not heretofore given away, should be so divided." The testator appointed his son Burrel Branch and two others executors of his will, who after his death proved the same and undertook the execution thereof: and Benjamin Branch, the survivor of the said Executors, having died intestate, administration *de bonis non* with the will annexed, was granted to Bowen Branch, the defendant in this case. Polly and Rebecca, two of the testator's children and legatees as aforesaid, died unmarried and intestate, leaving four brothers, Burrell, Bowen, Thomas and Norman, and one sister named Elizabeth, them surviving. Administration of the estate of Burrell Branch, deceased, was granted to Bynum and Parker, who brought

this bill in Equity against Bowen Branch, the Administrator *de bonis non* of John Branch, deceased, and therein claimed on behalf of their intestate his distributive share of the negro slaves aforesaid, as one of the next of kin (133) of his deceased sisters, Polly Branch and Rebecca Branch. Upon the hearing of the cause two questions arose which were referred to this Court: 1st. Whether the negro slaves Curtain and Queen, (mentioned in the first clause of the will of John Branch, deceased,) bequeathed to the widow during life, are included in the second clause of the will? 2d. Whether the complainants can sue for the shares of Polly and Rebecca Branch, and claim a distributive part thereof on behalf of their intestate, without having the administrators of said Polly and Rebecca before the Court?

BY THE COURT—We are of opinion that the negro slaves mentioned in the first clause of the will, after the death of the widow, belonged to the children named in the second clause; but that the representatives of Polly Branch and Rebecca Branch must be made parties, before complainants can have a decree for a distributive share of their estate.

NEIL, Assignee, *v.* NEWBERN.

From Edenton.

An executor or administrator may assign the security of his testator or intestate, without naming himself executor or administrator.

Verdict for the plaintiff and rule for a new trial.

The question in this case referred to this Court, was whether an Executor or Administrator can assign the Securities of his Testator or Intestate, without naming himself Executor or Administrator? Elizabeth Raimeke, Executrix of the last will of her deceased husband, assigned the bond on which the suit was brought, to Neil, the plaintiff, without adding to her name the word *Executrix*. On the trial, the plaintiff proved the execution of the bond and gave in evidence the will of Raimeke, the Testator, and (134) a certificate of the qualification of the Executrix, and also proved the assignment.

BY THE COURT—Let the rule for a new trial be discharged.

THE STATE *v.* BRIDGES.

From Halifax.

Indictment contains two counts; one for a mayhem under the statute, and charges the defendant with aiding and abetting the mayhem. The other for an assault and battery—Defendant acquitted upon the first count and convicted upon the second. Judgment cannot be rendered against defendant upon this conviction.

The indictment contained two counts—the first charged that one James Philips and the Defendant, Daniel Bridges, with force and arms, of malice aforethought, unlawfully did make an assault upon one James Blackwell, with an intent to maim and disfigure the said Blackwell; and that Philips, of his malice aforethought, unlawfully put out the right eye of the said Blackwell with intent to maim and disfigure him: and that the Defendant, Bridges, at the time thereof, knowing and privy to the putting out of the eye of the said Blackwell by the said Philips, with force and arms, and of his malice aforethought, unlawfully was present, counseling, aiding and abetting the said Philips to put out the right eye of the said Blackwell, contrary to the act of Assembly, &c. The second count charged that the Defendant Bridges, with force and arms, made an assault upon the body of the said Blackwell, and him, the said Blackwell, did beat, wound, and ill-treat, &c. The jury found the defendant guilty upon the second count, and not guilty upon the first. It was submitted to the Court, whether the judgment could be rendered against the defendant upon this verdict; and

BY THE COURT—Upon the statement of facts in this case, judgment must be rendered in favor of the Defendant.

THE ADMINISTRATOR *de bonis non*, With the Will Annexed of Richard Kay, Deceased, *v.* WEBB *et al.*

From Halifax.

The purchaser of a tract of land dies before he pays the purchase money or receives a title, and by his will devises the land to aliens, who are his heirs at law, his representative having been compelled to pay the purchase money, those who take the land after his death, take it subject to this charge, and are bound to reimburse the purchase money to his representatives. And the land being sold by an order of the county court upon the application of the guardian, for the purpose of discharging demands against his ward's estate, the ward being made a party defendant to the bill filed for the purpose of having the purchase money reimbursed, demurred to the bill—the demurrer overruled.

Benjamin Edwards, Guardian of William E. Webb, an infant under the age of twenty-one years, having notice
(135) of debts and demands against the estate of his ward, applied to the County Court of Halifax, wherein his guardianship had been granted, for an order to sell so much of the real estate of his ward as might be sufficient to discharge such debts or demands, and the said Court in consequence of such application made an order particularly specifying that the said Benjamin might for the purposes aforesaid, sell a tract of land belonging to his ward, lying in the county of Halifax and containing by estimation four hundred acres. Edwards, in virtue of the premises, and of the act of Assembly in such case made and provided, exposed the said tract of land to public sale on six months credit; at which sale Richard Kay became the purchaser. Before Kay either paid the purchase money or received a title, to-wit. in the year 1794, he departed this life, having previously made and published his last will and testament in writing, duly executed to pass his real estates, and thereby devised his property both real and personal to his sisters, who were his heirs at law, subjects of the King of Great Britain, resident in England and aliens.

After the death of Kay, Edwards brought suit against Thaddeus Baines, Executor of Kay's will, for the purchase money aforesaid, and in Halifax Superior Court obtained judgment for the sum of £632 18s. 11d. Thaddeus Baines dying soon afterwards, administration *de bonis non*, with the will annexed of Kay, was granted to Sterling Marshall, who in the year 1799 paid to Edwards the amount of the said judgment, together with the sum of £39 18s. 8d. costs of suit. Webb, the ward, having afterwards arrived at the age of twenty-one years, and Edwards, his guardian having died, the Administrator of Edwards some time in the year 1802 came to a settlement with Webb, concerning the guardianship aforesaid, and in that settlement was included and fully accounted for the amount of the judgment aforesaid received by Edwards.

Kay was in the possession of the said tract of land
(136) at the time of his death. There was no actual occupancy of it afterwards until the year 1803, when Webb entered upon and became possessed of it. Marshall, the Administrator *de bonis non*, &c. having died, Administration with the will annexed of all and singular the goods

and chattels, rights and credits, which were of the said Richard Kay, unadministered by the aforesaid Thaddeus Baines and Sterling Marshall, was committed by Halifax County Court, to John Eaton, who being advised that it was doubtful whether the real title to the said tract of land remained in Webb, or had escheated and vested in the Trustees of the University of North Carolina, or belonged to the state; and also advised, that whoever became entitled to it on the death of Kay, took it subject to the burthen of paying the purchase money aforesaid; and as the estate which he represented had been compelled to pay the judgment for the said purchase money and costs of suit, that the person or persons entitled to the land ought to reimburse to him the said judgment and costs with the interest, or permit the said tract of land to be sold for that purpose in the first instance; filed a bill in the Court of Equity for Halifax district against the said William E. Webb and the Trustees of the University of North Carolina, and therein prayed that the Attorney General of the State being attended with a copy of the bill, might appear and put in his answer thereto on the part of the State; that the person or persons entitled to the land might be decreed to pay to him the amount of the aforesaid judgment and costs with interest, or that the land might be decreed to be sold in the first instance for this purpose; and that all proper parties might be decreed to join in a conveyance to the purchaser under the said sale.

To this bill Webb demurred, and the complainant joined in demurrer. Seawell, the Attorney General, put in an answer on the part of the state, stating that he had no knowledge of any of the facts set forth by complainant, and (137) prayed that the interest of the state might be protected, by complainant's being put to full proof of his case, &c. The case was sent to this Court upon the question, whether the demurrer filed by Webb ought to be allowed? And,

BY THE COURT—Let the Demurrer be overruled.

JACKSON *v.* ANDERSON *et al.*

From Halifax.

The articles of a horse race being for five hundred dollars—play or pay—parol evidence admitted to prove by the rules of racing the money should be staked: and parol evidence cannot be admitted to shew that a bond given at the same time for five hundred dollars had relation to the articles, and that the meaning of the parties was that the money should not be staked.

This was an action of debt brought on a bond given by Defendant to the Plaintiff for the sum of five hundred dollars, to which the Defendant pleaded that the bond was delivered as *an Escrow.* The jury found that the bond had been delivered as an Escrow, but that the conditions on which it had been delivered, had been performed, and assessed the Plaintiff's damages, &c. subject to the opinion of the Court on the following case. The Plaintiff and Defendant Anderson entered into a horse-racing contract and executed articles. The articles were for five hundred dollars, *play or pay;* and parol testimony was offered and received, which proved that in such cases, according to the rules of racing, the money shall be staked, which had not been done. It was then urged for the Plaintiff that the bond given at the same time, explained the meaning of the parties to be, that the money need not be staked; to which it was objected that parol evidence could not be given to shew the bond had relation to the articles. If such testimony ought to have been received, the verdict to stand; if otherwise, a non-suit to be entered.

BY THE COURT—Let a non-suit be entered.

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(138) Den on Demise of the HEIRS OF DENNIS *v.* FAN.

From Wilmington.

Part of the lands to which the defendant set up claim were included within his fence and he was in the actual adverse possession thereof at the time of the conveyance to the lessors of the plaintiff, the plaintiff is not entitled to judgment for the lands lying within defendant's fence.

Watson and wife conveyed to the lessors of the Plaintiff a tract of land lying in Onslow county, on a part of which

the Defendant had erected a house, cleared and inclosed a plantation, and was in the actual adverse possession thereof at the time of said conveyance The Defendant set up a claim and defended for more of the land than was then inclosed. The jury found a verdict for the Plaintiff, subject to the opinion of the Court on the question "whether the Plaintiff was entitled to recover such parts of the premises as were under fence and in actual adverse possession of the Defendant at the time Watson and his wife conveyed to the lessors of the Plaintiff.

BY THE COURT—This question has been often decided. The Plaintiff is not entitled to judgment for the land lying within Defendant's fence.

LANIER *v.* AULD'S ADMINISTRATOR.

From Fayetteville.

An express warranty excludes an implied one—In the contract of sale, the law implies no warranty as to the quality of the goods sold, although it may imply a warranty of title where the vendor is in possession at the time of the sale.

Auld sold a negro named Jim to Lanier, at the price of one hundred and sixty pounds, and at the same time executed the following writing, to wit:

"This is to certify that I have sold a negro man by the name of Jim for the sum of one hundred and sixty pounds in hand paid by Isaac Lanier; and I doth warrant the aforesaid slave Jim to be sound and healthy, not over twenty five years of age. Given under my hand, July 12th, 1796.

"JOHN AULD.

"Teste, FANNY DICKSON."

The negro was delivered to Lanier, and Auld (139) shortly afterwards dying intestate, Harrington obtained letters of administration on his estate. The negro Jim at the time of the sale, and long before, was a free-man and not a slave. Lanier brought an action of assumpsit against Auld's administrator, and declared upon a Warranty that the said negro Jim was a slave—And the questions arising in this case and referred to this Court were,

whether the above writing, executed by Auld, contained a warranty that the negro Jim was a slave? and if it did not, whether the law implied such warranty in the contract of sale in this case?

BY THE COURT.—The Plaintiff has declared, first, upon an express warranty; and secondly upon an implied warranty. The writing signed by Auld contains no warranty that the negro Jim is a slave: it contains a warranty that he is sound, and also that he is not over twenty-five years of age, but is silent as to other qualities. It is true that the word *Slave* is used, but it is evident that this word is merely descriptive of the person to whom the warranty of soundness, &c., was applied. As to the second question, we are of opinion that the law will not imply what is not expressed, where there is a formal contract. Evan's Essay 32. 1 Forbl. 364. Doug. 654. 6 Term Rep. 606. The express warranty as to soundness and age excludes any implied warranty as to other qualities. The contract of sale implies no warranty as to the quality of the goods sold, although it may imply a warranty of title when the vendor is in possession at the time of the sale. The Plaintiff, however, is not without a remedy; and he having applied to the Court for leave to amend his declaration by adding a count for money had and received, we are of opinion that such leave should be granted to him upon such terms as the Court below shall direct.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

DECEMBER TERM, 1806.

(140) WILCOX *v.* MACLAINE, Executor, &c.

From Hillsborough.

The cause being heard upon bill and answer in 1787, and a decree made in favor of complainant and two reports made in his favor since a petition for a rehearing was directed on the ground that the answer denied the equity of the bill and was to be taken as true, it not being replied to; and leave to reply to the answer refused on account of the distance of time and death of parties and witnesses.

This cause coming on to be heard at October term, 1787, upon bill and answer, a decree was made in favor of complainant; and since that time two reports were made by the master in his favor. At October term, 1802, the defendant petitioned for a rehearing on the ground that the answer denied the equity of the bill, and ought to have been taken as wholly true. The Court of Conference directed a rehearing, and now the complainant moved for leave to reply to the answer; and whether such leave should be granted was referred to this Court.

BY THE COURT—At this distance of time, when some of the parties, and probably many of their witnesses, are dead, leave cannot be granted to the Complainant to reply to the Defendant's answer.

PEARSON *v.* HADEN'S EXECUTORS.

From Salisbury.

The sum levied upon an execution being insufficient to discharge the plaintiff's judgment, must be applied solely to his use; and the costs of defendant's witnesses are not to be paid out of the sum thus levied.

Pearson having recovered a judgment against Haden's Executors for two thousand five hundred pounds, execution was sued out, upon which the Sheriff levied the sum of one thousand eighty-nine pounds ten shillings, which sum being insufficient to discharge the judgment, a question arose whether the costs for the attendance of Defendant's witnesses should be paid out of the monies levied, or the said monies be applied solely to the Plaintiff's use.

BY THE COURT—The costs of Defendant's witnesses ought not to be deducted out of the money levied upon the Plaintiff's execution. The sum levied being insufficient to discharge the plaintiff's judgment, must be applied to his use only.

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(141) GAY *v.* HUNT.

From Halifax.

A. being subject to intoxication and on that account liable to imposition; and fearing that in some unguarded moment some person might obtain from him a conveyance of his lands, agrees with B. to convey the lands to him by an absolute deed, and B. agrees to hold the land as a trustee for C. one of the children of A. The conveyance being executed, C. and his agents remain in possession of the lands and B. does not call them to account for the rents and profits. B. dies and devises the lands to C. and D. as tenants in common. C. files a bill charging the above facts. D. answers and denies the trust, and insists that the premises were purchased by B. for a valuable consideration—parol evidence will be admitted to prove the trust, as B did not take possession of the premises nor call C. to an account for the rents and profits.

Sherwood Gay an infant, by his next friend Rebecca Stallions, filed a bill in the Court of Equity for Halifax district, against Charity Hunt, and therein charged that his father Elias Gay being siezed in fee of a tract of land situate in the county of Franklin, and being a man much addicted to intoxication, and on that account often liable to imposition; and fearing that in some unguarded moment some person

might obtain from him a conveyance of his said land, and desirous to secure the same so that Complainant might have the benefit thereof, agreed with one William Brinkley to convey the same to him in fee, he the said William agreeing on his part to hold the said land in trust for the benefit of Complainant and to convey the same to him whenever he should be thereunto requested. That in pursuance of this agreement Elias Gay conveyed the land to Brinkley, but that Brinkley did not give any valuable consideration for the land; that Brinkley had since died, having made his last will and testament, and therein devised the said land to Complainant and the Defendant Charity Hunt, to hold the same as Tenants in common. That notwithstanding the conveyance to Brinkley, Complainant's friends and agents had continually kept the possession of the said land; that Defendant well knew that Brinkley held the said land only as a Trustee for Complainant, yet that she had lately filed a petition in the County Court of Franklin, for the purpose of having partition made of the said land. The bill prayed for an injunction and that Defendant might be compelled to convey to Complainant the legal title and claim which she had in the land.

To this bill the Defendant answered, that she had no knowledge of any of the facts therein charged, but that she had been informed and believed, that Brinkley purchased the land from Elias Gay, and paid a full and valuable consideration therefor; and that the said purchase was made, and the deed executed without any trust, and sub-
(142) ject to no condition whatever. The answer admitted that Patsey Gay, the mother of Complainant and also of Defendant had kept possession of the land, but alleged that this possession had been suffered from motives of affection for a parent.

Sundry depositions were taken in the cause, which proved the agreement and trust charged in the bill: and the cause coming on to be heard, the question was made and sent to this Court, whether as the deed to Brinkley purported to be absolute and for a valuable consideration, and the agreement and trust charged in the bill were expressly denied by the answer, parol evidence could be admitted to prove the agreement and trust?

BY THE COURT—The conveyance to Brinkley was not made

with any fraudulent intent or from any motive of moral turpitude. This case is therefore free from the common objections to relief in cases of secret trust. Whether parol evidence will be admitted to set up a trust, where a deed is absolute, depends much upon the particular circumstances of each case in which it is attempted: in the present case the Court are of opinion that the parol evidence should be admitted, as Brinkley did not take possession of the premises conveyed to him, nor call upon those in possession for an account of the rents and profits; and this "being contrary to the ordinary effect of a sale, gives an impression of a trust of some kind, between the parties, and admits the introduction of evidence to explain the trust." 1 Wash. Rep. 14.

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(143) BRYSON *et al. v.* DAVIDSON'S EXECUTOR.

From Salisbury.

A devises his estate to his "daughter B. and if B dies without having heirs, then, and in that case, to the nephews and nieces of A." The limitation over to the nephews and nieces is too remote.

This was a petition for a legacy claimed under the following clause of the will of Thomas Davidson, deceased. "I give and bequeath to my well beloved daughter, Mary Long Davidson, my negro woman named Nancy, and all her children, together with all my lands and tenements, and the remaining half of my household furniture and personal estate: also my will is, that she be allowed out of her own part what my Executor may think a sufficient sum, for cloathing, schooling and boarding with her mother according to her income, or the interest of her money; likewise my will is, that if the said Mary Long Davidson *dies without having heirs, then*, and in that case the property bequeathed to her shall be divided into four equal parts between my brother James, John, Samuel and Hugh Bryson's children, that is to say, each of my brother's and sister's children." Mary Long Davidson died in her infancy, without having had any issue; and this petition was filed by the nephews and nieces of the Testator against his Executor for an account and distribution of the personal estate; and the only question in the case was, whether the limita-

tion to the nephews and nieces, in the event of Mary Long Davidson *dying without having heirs*, was valid.

For the petitioner it was urged that the ulterior devise being to the collateral heirs of Mary Long Davidson, the Testator must have intended to use the word "*Heirs*" in a limited and not a general sense, and to have meant "Heirs of the body" of Mary Long Davidson, and not her heirs general. It is a settled rule of construction in executory devises, that when the devise over is to a collateral heir of the first devisee upon the failure of his or her heirs, or for the want of heirs, &c., the word *Heirs* shall always be taken to mean *Heirs Special* and not *Heirs general*. Cro. Jac. 416; Doug., 216; 2 Fearne in notes, 153 The testator (144) therefore intended that the estate should go over to his nephews and nieces, in case his daughter Mary should die without having issue.

The term "dying without having issue or children" in common parlance is understood in two senses—first, dying without having had issue—secondly, dying without having issue living at the time of the death. It is difficult to determine in which sense the testator Thomas Davidson used the term. It is obvious that the two meanings of the term are very different; but it is immaterial in this case which meaning he adopted; for either will entitle the petitioners to a decree, the limitation to them being to vest, if at all, upon the death of Mary the first devisee.

The word "Having" is a participle of the present time and may therefore be considered as being used by the testator as expressive of *present time;* that is, the time of Mary's death; "if she should die without having heirs;" and taking the word "Having" in this devise as a participle of the present time, it means not only the birth of issue, but that that issue should be in *esse* at the time of her death. For unless the issue were living at the time of her death, she could not then be said to *have issue.* If the testator used the word "Having" in this sense, the limitation to the nephews and nieces is not too remote, for it is to take effect immediately upon the death of Mary without issue at her death. The word "Having" is some times used as past time, and then it has the same meaning as the perfect past participle of the verb "to have," to-wit, "having had." If the testator intended to use it in this sense, his meaning was, that if Mary Long Davidson should die without *having had*

any heirs of her body, then the estate should go over to his nephews and nieces; and then the devise to Mary is conditional, the condition being, "*her having had Heirs of her body.*" Until she has heirs of her body, her estate is conditional; as soon as issue is born the condition is performed and her estate becomes absolute. Mary's estate re-
(145) sembles the ancient fee-simple conditional at the common law; the moment that issue was born to the donee, his estate in the land became absolute, the condition of the gift being performed. If then the participle "Having" be taken as a participle of past time, it must relate to time anterior to Mary's death, within which she might have issue; as a participle of the present time, it must relate to the time of Mary's death. In no way can the grammatical or vulgar meaning of this participle be construed to extend to time posterior to Mary's death, much less to include such a quantum of time as twenty-one years subsequent to that event.

If the word "having" did not determine with sufficient precision the time when the ulterior limitation was to vest, if at all, that time would be pointed out by the word "*then*" used in the devise It is not here used as an adverb of reference, otherwise the subsequent words "*and in that case*" would not have been used. It is here used as an adverb of time, and can be referable only to the time of Mary's death. There seems to be no ground whatever to put this case upon the remoteness of the second limitation; it being clear in every way in which the words of the devise can be construed, that if the second limitation is to take effect, it must be at Mary's death. In the case of Weakly *v.* Rugg, 7 Term Rep. 322, the devise was to the testator's "daughter Ann, but if she should happen to die without *having child or children lawfully begotten*, then to his daughter Mary, and after her to such child or children as she should happen to have lawfully begotten." Anne married and had three children, who as well as the husband died in Anne's lifetime. The question was, whether Anne was entitled to the whole interest in the estate devised? And the court held that as Anne had had issue, the condition was performed and the estate vested absolutely in her upon that event. The case differs in no respect from the case before the court, except in the birth of issue.
(146) The devise in each is to a favorite daughter; the words expressing the contingency upon which the

limitation over was to vest, are in substance the same; one testator using the words "*without having child or children lawfully begotten*," the other "without having heirs," evidently meaning heirs of the body. If therefore in the case of Weakly *v.* Rugg, it was held that Anne, the first taker, was entitled to the whole interest in the estate devised, because she had had issue, she surely would not have been thus entitled, if she had had no issue; and Mary Long Davidson, having had no issue, the whole interest never vested in her absolutely, but upon her death vested absolutely in the ulterior devisees. But

BY THE COURT—The limitation over to the nephews and nieces is too remote, and therefore void.

HUGHES *v.* HOLLINGSWORTH.

From Morgan.

Pending a suit, the attorney at law for the plaintiff, gave to the bail of the defendant a paper writing, in which "he agrees that the plaintiff shall release and discharge the bail;" this is a discharge of the bail.

John Hughes brought suit against Abraham Hollingsworth in Morgan Superior Court and recovered a judgment. Samuel Hollingsworth was the bail of the defendant, and pending the suit, Joseph Spencer attorney at law for Hughes the plaintiff gave to Samuel Hollingsworth a paper writing in the following words, to-wit:

"I agree with Mr. Samuel Hollingsworth, on behalf of Mr. John Hughes of Burke, as empowered by the said Hughes, that the said Hughes shall and will release and discharge the said Samuel Hollingsworth from being security for Abraham Hollingsworth in a suit which is now depending in the Superior Court of Morgan district, John Hughes against Abraham Hollingsworth.

JOSEPH SPENCER."

Hughes sued out a *Scire Facias* against Samuel Hollingsworth, as bail of Abraham Hollingsworth, to which
(147) the defendant pleaded "a release by the plaintiff's attorney;" and whether the paper writing, signed by

Joseph Spencer, the Attorney at law for Hughes, discharged the bail, was referred to this court.

BY THE COURT—We are of opinion that the paper writing signed by the attorney at law for the plaintiff is a discharge of the bail.

THE STATE *v.* ELIZABETH GRAY.

From Hillsborough.

Females are entitled to the benefit of clergy.

In this case the only question was, whether the defendant, who was convicted of grand larceny, was entitled to the benefit of Clergy? And

BY THE COURT—No reason can at this day exist, why Females shall not be entitled to the benefit of Clergy, as well as Males. We are therefore of opinion that the defendant is entitled to the benefit of Clergy, upon praying the same to be extended to her.

JUDGES OF THE SUPREME COURT

OF

NORTH CAROLINA,

DURING THE YEAR 1807.

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*SPRUCE M'CAY, Esquire,
*JOHN LOUIS TAYLOR, Esquire,
JOHN HALL, Esquire,
FRANCIS LOCKE, Esquire,
‡DAVID STONE, Esquire,
‡SAMUEL LOWRIE, Esquire.

HENRY SEAWELL, Esquire, Attorney General.
EDWARD JONES, Esquire, Solicitor General.

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*Judges M'Cay and Taylor were absent at this Term.

‡ At the last General Assembly, the Judiciary System of North Carolina, which had existed with little alteration since the year 1777, was amended, and a Superior Court of Law and Court of Equity were established in each county. This alteration required an additional number of Judges, and David Stone, Esq. and Samuel Lowrie, Esq. were appointed to the Bench by the General Assembly.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JULY TERM, 1807.

WINAUT'S HEIRS *v.* WINAUT'S DEVISEES.

From Edenton District.

A to whom testator devises permission "to live six months in his house, if she chooses" is a competent witness to prove the will as to the real estate.

The testatrix, Penelope Winaut, duly published her last will and testament in writing, in the presence of James Ward and Margaret Haughton, the only subscribing witnesses thereto: in which will was contained the following clause, to wit: "I give and bequeath unto Margaret Haughton one woolen wheel, one white round table, all my chairs, and six months to live in the house, if she chooses." Margaret Haughton was one of the subscribing witnesses to the will, and the question referred to this court was, Whether
(149) the said Margaret was competent to prove the will as to the real estate?

BY THE COURT—The devise to the witness, Margaret Haughton, of permission to stay six months in the house, if she chooses, conveys to her no title either to the house or land: and the will being sufficiently proved as to the personal estate by the other witnesses, there appears to be no such interest in Margaret Haughton as to destroy her competency as a witness to prove the will for the land.

NELMS and M'CULLOCH, Assignees of Baker, Bankrupt, *v.* PUGH.

From Halifax District.

Under the bankrupt law of the United States the arrest and imprisonment of the debtor are both necessary to constitute the act of bankruptcy, which act is not complete, until the time of imprisonment prescribed by law be completed.

The court has no authority to establish any other act of bankruptcy than the one on which the commission issued.

The Jury found a verdict for the plaintiffs subject to the opinion of the Court upon the following case.

The bankrupt, Henry Baker, on the 24th day of August, 1803, was arrested on a writ of *capias ad satisfaciendum*, bearing teste the third Monday of August, and committed to jail. Two days afterwards a writ of *fieri facias*, bearing equal teste with the aforesaid writ of Ca. Sa. was delivered to the said sheriff, who levied the same upon the goods, &c., of the bankrupt, Baker, at the instance of the defendant, Henry Pugh; and before two months expired after Baker was arrested, sold the said Goods, &c Baker remained in jail upwards of two months, and was afterwards duly declared bankrupt, on a petition and commission founded on the said imprisonment, and continued in prison, and proof made thereof. On the sixth day of April, 1803, for a debt then due by the bankrupt to Marmaduke Norfleet, he by deed conveyed to said Norfleet all his real estate; the suits of John and William Bell, of Andrew Flemming, &c., and the present defendant, then pending in Halifax County Court, in which suits judgments were obtained at the August term
(150) aforesaid, and the bankrupt was indebted at that time more than he was worth.

Cameron, for the plaintiff, contended that they were entitled to judgment upon either of two grounds stated in the case—first, that Baker being arrested on the 24th of August, 1803, and having continued in jail for two months and more, his imprisonment *relates back* to the time of the arrest, and makes the act of bankruptcy take place on the 24th day of August, so as to overreach and make void all intermediate acts before the two months were completed—the writs of *fi. fa.* under which the goods of the bankrupt were sold issued two days after Baker had been arrested, and while he was confined in prison, and consequently when the bankruptcy had commenced, which was completed by his continuing in jail for two months afterwards. That the bankruptcy dates

from the first arrest, he cited King *v.* Leith, 3 Term Rep. 141, 1 Bac. Ab. title Bankruptcy—the act of Congress relating to bankruptcy should receive the same construction that has been given to the British statutes upon this subject. The reasons given in 1 Burrows 474, 483, for the construction of the bankrupt laws in England, apply in their fullest force to the bankrupt law of the United States; and were the act of Congress to receive the construction contended for on the part of the defendant, it could not produce that perfect equality which it intends between the *bona fide* creditors of the bankrupt, or of restraining one creditor from acquiring a preference over another equally meritorious. At the time the several judgments mentioned in the case were obtained in the County Court of Halifax, it is certain that the trader was in a state of insolvency, and unable to pay *all* his creditors to the *full* amount of their respective demands. Justice and the *true* spirit of the bankrupt law required that whatever funds the unfortunate trader had, should be *equally* apportioned among those persons who had placed
(151) their property in his hands to trade upon for their common benefit; and yet while the trader was imprisoned, and the bankruptcy progressing to maturity *one* creditor by means of execution possesses himself of the whole of the trader's effects, before the expiration of the two months—this is an advantage never intended by the bankrupt law, to any individual creditor. To avoid this advantage the act must receive the construction contended for by the assignees, namely that the bankruptcy (the two months having expired) must relate to the first arrest—if so, Baker was a bankrupt on the 24th day of August, 1803, his estate vested in the assignees from that moment, and they are entitled to judgment on this ground.

Secondly—On the 6th day of April, 1803, Baker being then indebted more than he was worth, conveyed all his real estate to Norfleet, one of his creditors, the suits of the Bells, Flemming & Co. and of the present defendant, then pending against him. The conveyance was a clear and unequivocal act of bankruptcy: it was giving one creditor a preference at the expense of all his other creditors. 1 Bur. 467. 2 Bur. 829. 4 Bur. 2174. 3 Wills 47. Cowper 629. 1 Brown Ch. Cases 99. Doug. 91. These cases also shew that every conveyance by deed in contemplation of bankruptcy, is an act of bankruptcy; nor does it matter how meritorious

the creditor may be—But it is said that this act of bankruptcy cannot avail the assignees in this action, because it was not the act of bankruptcy on which the commission issued. To this it is answered that it is wholly immaterial on what particular act the petition and commission may be founded. There may have been many acts of bankruptcy committed by the trader before any application made by the petitioning creditor for a commission. But when the commission does issue, the assignees have a right to recover in any property which belonged to the trader at any period when he was insolvent, and in contemplation of bankruptcy committed an act which in law amounts to bankruptcy—All the creditors of a trader ought to be considered as
(152) his partners, and if a loss must be sustained, all the creditors should bear a proportional share of it.

STONE, *Judge*—Delivered the opinion of the Court.

The question, whether the bankruptcy shall relate back to the arrest so as to avoid all intermediate dispositions of the bankrupt's effects between the time of the arrest and the completion of the term of imprisonment, considered by the law as amounting to an act of bankruptcy, can only be settled by the statute itself. That declares, the arrest and imprisonment are both necessary to constitute the act of bankruptcy, and not that either independently of the other shall be sufficient: and they do not both exist until the term of imprisonment limited for that purpose by the statute has expired. The authorities from the English books introduced to shew that the bankruptcy is in England made to relate back to the arrest, are answered by the statutes of bankruptcy themselves. A statute subsequent to that of 5th Jac. Cap. 15, vid. the statute of 21. Jac. 1, Cap. 19. expressly declares that the bankruptcy shall relate back to the arrest. The act of Congress contains no such provision.

The second point made, that a precedent act of bankruptcy existed, cannot differ the inference above; because we have no authority for establishing any other act as an act of bankruptcy, than the one on which the commission issued. Judgment for the Defendant.

Den on Demise of EDWARD BRYAN *v.* JEREMIAH PARSONS, Jun'r.

From Newbern District.

Plaintiff offered in evidence a copy of a registered deed, offering to swear that he had not the original, nor knew where it was. Defendant had given notice to plaintiff to produce the original; and leave was then given to him to shew that the original had been altered before its registration, and had been since destroyed by the approbation of the plaintiff. Copy refused in evidence, and plaintiff non-suited.

Upon the trial of this action of ejectment the plaintiff offered as evidence to the jury a registered copy of a deed from Martin and Edward Franks, to the plaintiff's grandfather, also called Edward Bryan. From him the land by said deed conveyed as it was alleged, descended to (153) John Bryan, the plaintiff's father, who, on the 25th September, 1786, conveyed the same to Edward Bryan, the plaintiff, John Hill Bryan, William Bryan, Frederick Bryan, and Joseph Bryan, reserving to himself a life estate. The defendant alleged that in the deed from Martin and Edward Franks to the plaintiff's grand-father, an alteration had been made of one of the courses of the land previously to the registry of the deed, so that on the copy offered to the jury it appeared North 5° East, instead of North 45° East; objected to the copy as evidence, and insisted that the original deed should be produced. The plaintiff offered to swear that he had not the original, and knew not where it was: the defendant begged to be permitted to shew to the Court by testimony that the said original deed had been destroyed intentionally, with the approbation of the plaintiff, to prevent the alteration of its course being seen; and he proved that he had caused a notice to be served upon the plaintiff that the production of the original deed at the trial would be insisted on. He was permitted to introduce the evidence to shew the alteration of the deed, and the evidence being full and satisfactory that the deed had been altered, the plaintiff was non-suited. A rule was obtained upon the defendant to shew cause why the non-suit should not be put aside and a new trial granted, on the ground of misdirection by the Court, and the case was sent to this Court for the opinion of the Judges.

BY THE COURT—The attempt of this plaintiff to introduce, in evidence, a copy of the deed under which he claims, connected with the circumstances of this case, certainly deserved

no countenance from the Court. The claim had once been tried (when the original deed was introduced) and failed on account of the marks of fraud and alteration upon the face of the deed. The plaintiff and those connected in title with him under the same deed, afterwards declare that
(154) deed shall not again make its appearance to defeat their title; and in conformity with that declaration the plaintiff now swears that he has not that deed in his possession, nor does he know where it is. All this may well comport with a fraudulent concealment or destruction of the deed; and the court will not presume favorably of an attempt so strongly marked with fraud. If this plaintiff and those connected in interest with him have so contaminated that evidence which the law considers the best to be submitted to the Jury, the Court will not aid them by permitting the introduction of inferior evidence where the marks of fraud do not appear. It seems to be a leading principle laid down in all the books on the subject of written testimony, that all original private deeds or other instruments (if in existence, and in the power of the party) shall be produced on the trial. But where the original has been destroyed or lost by accident; as where an original award was lost in a mail which was robbed; or being in the hands of the adverse party, and notice given to produce them, then an examined copy or even parol evidence of the contents, being the best evidence in the power of the party, may be received—Peak, 63—yet this is always upon a principle of necessity, and to avoid injustice where the party has been guilty of no fraud: and to permit this plaintiff to give in evidence the copy which he offers would be to afford to him the very advantage intended by his fraud. Let the rule be discharged.

HOLDING'S EXECUTOR *v.* SMITH.

From Hillsborough.

To the plea of sett-off there may be a double replication.

In this case among other pleas the defendant pleaded a sett-off. To this plea the plaintiff replied—first, there was no such sett-off—and secondly, the statute of limitations.

To this replication the defendant demurred specially,
(155) and for cause of demurrer alleged that the replication was double.

LOCKE—*Judge*—delivered the opinion of the court. According to the strict rule of pleading upon common law principles, this replication is certainly bad; but it appears to be good under the provisions of our act of Assembly. Iredell 305. This act does not warrant a double replication to every plea, and perhaps allows it to no plea but that of sett-off. This plea was allowed in England by Stat. 2d, Geo. 2d, Ch. 22, and adopted by our act of 1756: the preamble of which states that the object of introducing the plea was to prevent multiplicity of law suits; and wherever there were mutual debts subsisting, instead of compelling each party to sue, one debt was allowed to be sett-off against the other, and this in lieu of an action, or rather cross-action. Every defendant therefore pleading a sett off is to be considered (so as respects this plea) in the light of a plaintiff, and bound to produce the same testimony to support it that would be required to enable him to recover in that character; and consequently the plaintiff against whom the sett-off is pleaded, ought to be permitted by way of replication to make the same defence which the law would permit him to enter by way of plea, had he been originally sued. If then the present defendant had sued the plaintiff on this account, would he not, in the character of defendant, have been permitted to plead the general issue and statute of limitation? He surely would, and if so, he may reply the same to the sett-off. Let the demurrer be overruled.

(156) THE STATE *v.* JOSEPH STREET.

From Hillsborough District.

In an indictment for perjury, the stile of the court before which the perjury is alleged to have been committed must be legally set forth.

The defendant was indicted for perjury; and the indictment charged "that at a certain *Superior Court* begun and holden for the district of Hillsborough on the sixth day of October, in the year of our Lord one thousand eight hun-

dred and five, in the town of Hillsborough, in the county of Orange, in the aforesaid district, before the Honorable Francis Locke, Esq., *Judge of the said court*, on the sixteenth day of the said month in said year a certain issue duly joined in the said court between the state and Zephariah Tate, and others, in a certain prosecution for a riot, came to be tried in due form of law, and was then and there tried by a certain Jury of the country in that behalf duly sworn and taken between the parties aforesaid; and that upon the trial of the said issue so joined as aforesaid one Joseph Street, late of the county and district aforesaid, yeoman, appeared as a witness for and on behalf of the state, and was sworn, and then and there did take his corporal oath upon the holy Gospel of God, before the said Francis Locke, Esq., Judge as aforesaid, to speak the truth, the whole truth, and nothing but the truth touching and concerning the matter in question in the said prosecution and issue aforesaid, (the said Francis Locke, Esq., then and there having sufficient and competent power and authority to administer an oath to the said Joseph Street in that behalf.)" The indictment then assigned the perjury, &c., the defendant was convicted, and Duffey, counsel for the defendant, filed the following reason in arrest of judgment, to wit: "That the stile of the Court or of the Judge presiding therein when the perjury is alleged to have been committed, is not duly or legally set forth; nor any jurisdiction shewn to administer such oath as is alleged to have been taken falsely and corruptly"—and the case was ordered to be sent to this Court for the opinion of the Judges.

(157) BY THE COURT—The indictment should set forth the legal stile of the Court before which the perjury is alleged to have been committed. The Judiciary Act of 1777, establishing the County and Superior Courts, gives the stile of each, "Courts of Pleas and Quarter Sessions," and "*Superior Courts of Law*." The indictment in the present case charges the perjury to have been committed before "a *certain Superior Court* begun and holden for the district of Hillsborough." As the stile of the Court is not legally set forth the indictment is defective and the judgment must be arrested.

SINGLETON *v.* OGDEN, Administrator of CASWELL.

From Newbern District.

A. is indebted to B. upon bonds, and in 1777 offers to pay in depreciated currency. The bonds are absent. B. refuses to accept the depreciated money, but agrees, that in consideration of A's having offered to pay, and the bonds being absent, no interest shall be thereafter charged until the bonds are produced and payment demanded in this state. Equity will enforce this agreement.

On the 10th day of May, 1774, Spier Singleton for himself and Benjamen Caswell, his partner in trade, gave a bond to Samuel Caswell, then of Newbern in North Carolina, for the penalty of £1080, proclamation money, conditioned for the payment of £540 like money, on the 10th day of March ensuing; and on or about the 23d day of November, 1774, for himself, another bond for the penal sum of £2796, proclamation money, conditioned for the payment of £1397 13 like money, on the 23d November in the year following. Several considerable payments were made towards the discharge of the said bonds, but a balance still remained unpaid, and before the day of payment of the last mentioned bond, to-wit, about August, 1775, the said Samuel Caswell voluntarily left the state, carrying the said bonds with him, and did not return until the month of December, 1777, but he left his family and effects still remaining at Newbern aforesaid. On the return of Caswell, Singleton waited on him and offered to pay him the balance of principal and interest due upon the said bonds, and was proceeding to count the money to Caswell, who desired Singleton not to proceed, as he had
(158) not the bonds with him, and at the same time promised and assured Singleton that although he could not receive the money (it being depreciated paper money) nor give up the bonds, yet in consideration that Singleton had offered to pay the money and the bonds were absent, no interest should be charged thereon from that day, until they should be produced and the payment demanded within the State. Caswell in a short time again departed taking his family and effects from the state and returned no more, but died in New York in 1781: nor were the bonds ever afterwards produced within this state nor the payment of them demanded until about the month of May, 1798. Singleton was afterwards required to pay and did pay the balance of the principal and interest due upon the said bonds at the time of offering to pay the same to Caswell as aforesaid, to

the commissioners of confiscated property in pursuance of the acts of the General Assembly, commonly called the confiscation acts

In 1798, administration *de bonis non*, Caswell's estate, was granted by the County Court of Craven to Robert Ogden, and shortly afterwards Singleton waited on Ogden and offered to pay the balance of principal and interest due upon the bonds aforesaid at the time of offering to pay the same to Caswell as aforesaid: but Ogden refused to settle unless interest was paid upon the bonds for the whole time without any deduction; and instituted suits upon said bonds and recovered judgments. Singleton filed his bill in Equity praying that an injunction might be granted as to the interest which had accrued upon the bonds from the time he offered to make payment to Caswell up to the time that he offered to make payment to Ogden as aforesaid. Ogden in his answer insisted that Caswell was a British subject; that after the declaration of American Independence in 1776, Caswell had retired from North Carolina, went to New York where he continued within the lines and garrisons of His Britannic Majesty until his death, having retained his alle-
(159) giance but taken no part in the war; that the debts due upon the bonds aforesaid were within the meaning and provision of the fourth article of the treaty of peace concluded between His Britannic Majesty and the United States, directing that creditors on either side should meet with no legal impediments to the recovery of full value in lawful money of all bona fide debts theretofore contracted; that Caswell was under no legal or equitable obligation to accept depreciated paper money in payment of the bonds aforesaid, and that his promise or agreement that no further interest should be charged, was totally without consideration and ought not to be enforced. This case was transferred to this court for the opinion of the Judges upon the question, whether complainant was entitled to the relief prayed for in his bill.

BY THE COURT.—The defendant's intestate in this case promised not to demand interest at the time the depreciated currency was offered to him in payment; and the circumstance that he thereby avoided receiving what the law and the necessity of the times then made a legal tender, and which must unavoidably have sunk to nothing in his hands, affords such a consideration to support his promise as to

entitle the complainant to the aid of a Court of Equity to enforce a compliance with it. The injunction must therefore be made perpetual as prayed for by complainant.

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(160)

The Administrators of RICHARD QUINCE the elder *v.* the Executor of PARKER QUINCE.

From the Wilmington District.

A pays to B his co-executor a sum of money belonging to their testator's estate. A and B die. C, the administrator de bonis non of the testator, brings suit against the representatives of A, who survived B, for an account of testator's estate—the representatives of B who received the money must be made parties.

Richard Quince the elder died in the year 1778, leaving a last will and testament, in which his sons, Parker Quince and Richard Quince, jun., were named Executors, who after his death proved the will and qualified as Executors. Richard Quince, jun., died in the year 1780, intestate. Parker Quince died in the year 1785, leaving a will in which Thomas Callendar was named Executor, who qualified as such. The present bill was filed by John Davis, Administrator *de bonis non* of Richard Quince the elder in the year 1787, against Thomas Callendar, Executor of Parker Quince, and against Richard Quince and Rebecca Quince, infant children of Richard Quince, jun., the deceased executor, by Thomas Davis, their guardian. The bill charges that Parker Quince and Richard Quince, junior, Executors of Richard the elder, received into their hands property of their Testator to a large amount, and prays that an account may be taken and a decree made in favor of complainant for whatever sum shall be found due. Thomas Callendar, Executor of Parker Quince, filed an answer, and the accounts were referred to the master, who made a report, and therein among other things he charges the present defendant with a sum of money, said to have been paid by Parker Quince to Richard Quince, junior, his co-executor. On the hearing of the cause it was insisted by the defendant's counsel that Richard Quince the co-executor of Parker, having received into his separate possession some considerable property or

sums of money belonging to the Testator's estate, the representatives of said Richard Quince *alone* are liable, and not the estate of Parker; and that therefore no decree ought to be made until the representatives of Richard Quince were regularly before the Court. The counsel for the complainants contended that it was not necessary that the repre-
(161) sentatives of Richard Quince, Jr., the deceased co-executor should be before the court, upon the principle that Parker Quince being the surviving Executor of Richard Quince the elder, was liable for the whole amount of complainant's demands, and that the Executors of Parker Quince and not the complainant were the proper persons to call the representatives of Richard Quince, deceased, to an account for any supposed balance due by them. The case was transferred to this court for the opinion of the Judges upon the question whether the representatives of Richard Quince, deceased, should be made parties before a decree was made.

BY THE COURT.—In this case it is necessary, in order finally to settle the subject of litigation, that the representatives of Richard Quince, Jr., should be made parties previous to a decree. One of the principal items in the report of the master, against the present defendant, is a sum said to have been paid by Parker Quince to Richard Quince, Jr., his co-executor. If this sum was applied by Richard Quince, Jr., for the benefit of the estate of Richard Quince, Sr., the present defendant should not be made accountable for it: and that an opportunity may be had to shew this application, if made, the representatives of Richard Quince, Jr., should be before the Court, they should also be in Court, that if the money has not been so applied and the estate be solvent, a decree may be rendered against them for it in the first instance, to prevent circuity of remedy.

ELIZABETH GERARD *v.* SLADE PIERCE.

From Beaufort.

The Plaintiff instituted a suit against Defendant and pending said suit she intermarried with Henry Hunter, between

the January and July terms of the Court in the year 1805.

At January term 1806, the Defendant pleaded this
(162) intermarriage in abatement, and that Henry Hunter had not been made a party Plaintiff; to this plea the Plaintiff demurred and the defendant joined in demurrer; and the demurrer was overruled and the plea sustained by this Court.

Den on Demise of STROTHER *v.* CATHEY.

From Morgan.

A court of law will receive parol evidence to shew that the officers of state have issued a grant for lands forbidden by law to be entered and granted; and will take notice that such grant is void and that nothing passes by it.

Where a grant has issued irregularly, the party wishing to avoid it, must apply to a court of equity. The act of 1783, ch. 2, forbids entries or surveys to be made of certain lands set apart for the Cherokee tribe of Indians. In 1791 this tribe in a treaty made with the general government, "relinquish, release, and cede these lands." The right of the Indian tribe to lands is regarded by the European and American governments as a mere possessory right: and the cession of this right by the Cherokee tribe, vested the right in North Carolina, and the United States were the agents of North Carolina for that purpose.

This was an ejectment for lands lying within the bounds of the lands allotted to the Cherokee Indians by the Act of 1783. The lessor of the plaintiff claimed title under a grant from the state, issued 19th May, 1803, upon an entry made in 1791. The defendant claimed title under a grant from the state issued 8th December, 1787. The act of 1783, ch. 2, having declared that "no person shall enter or survey any lands within the bounds set apart for the Cherokee Indians under the penalty of fifty pounds, and that all such entries and grants obtained therefor (if any such should be made) shall be utterly void," the first question in the case was, whether upon the trial of the ejectment evidence could be received to shew the circumstances which rendered the grant, under which defendant claimed, void; and upon this being shewn, whether the Court could declare the grant void; it being contended on behalf of the defendant that although the grant under which he claimed title to the land was void, yet a court of law will not receive parol evidence on a trial in ejectment, to shew the grant void, but that recourse must

be had to a court of Equity, or to that mode of avoiding grants prescribed by the act of 1798, ch. 7. As the plaintiff in ejectment must recover by the strength of his own title, and not through the weakness of his adversary's, it also became a question whether the grants to the lessor of the plaintiff conveyed to him a title; for the act of 1783, ch. 2,
(163) had never been repealed by the legislature. On the 2d July, 1791, a treaty was made by William Blount on behalf of the United States with the Cherokee Indians, and it is stipulated in said treaty that "the Chiefs and Warriors of the Cherokee nation for themselves and the whole Cherokee nation, their heirs and descendants, for a consideration therein expressed, release, quit claim, relinquish and cede all the lands to the right of the line therein described;" and within the bounds therein described is the tract of land in question. It was contended that this treaty re-vested in the State of North Carolina the lands which the act of 1783, ch. 2, had vested in the Cherokee Indians; that although the treaty contained no declaration that the cession and relinquishment of these lands were for the use of this state, yet that the treaty must necessarily receive this interpretation; and that the United States acquired no title to these lands by the said treaty.

LOCKE, *Judge*—To determine the questions arising in this case, it is necessary to consider the titles under which each party claims the land in dispute. The Legislature of this state in the year 1783, passed an act, declaring "that all the lands comprehended within a line described in the 5th sec. of said act, shall be, and are hereby reserved unto the Cherokee Indians and their nation forever," and in the 6th sec. of said act, further declaring "that no person shall enter and survey any lands within the bounds set apart for the Cherokee Indians under the penalty of fifty pounds; and all such entries and grants thereupon (if any such should be made) shall be utterly void." The defendant claims title to this land under a grant issued by the state of North Carolina to John Carson, bearing date on the 8th day of December, 1787, whilst the above recited act was in full force, and before any treaty was made with the Cherokee Indians by which they surrendered or relinquished any of the rights reserved to

them by the act of 1783. It has been determined
(164) by this Court in the case of Strother *v* Avery, that a grant obtained under circumstances like the present, is utterly void, and can convey no title to the grantee, upon two grounds: first, because the words of the act are imperative and declare the grant to be utterly void: and secondly, because the officers of state were not authorised to issue grants for lands of this description; the state having by the act of 1783, divested itself of all title to the same. But it is contended that although the grant be void, yet a Court of law will not receive parol evidence on a trial in ejectment to shew the grant void, but recourse must be had to a Court of Equity, or to the mode of proceeding prescribed by the act of 1798, ch. 7, establishing the court of patents. This court entertains the opinion that it has always been competent for a court of law to receive parol evidence of the location of each tract of land described in a grant, and that in many cases it is only by such kind of testimony a grantee can shew the situation of the land mentioned in the plaintiff's declaration or in defendant's grant: and wherever it is shewn that the land claimed by the defendant is situate within the bounds allotted to the Indian nation, then the grant becomes *ipso facto* void: it requires no act to be done, no ceremony to be performed to avoid it, but it is of itself a mere nullity. Besides it is competent for a Court of Law at all times to receive parol evidence to shew that the officers of state, who have signed and attested the grant, were not authorised or empowered to issue a grant for lands of a particular description; for if they exceed the authority delegated to them by law, their acts have no force nor validity; and would it not be absurd to say, that a grant issued by an individual not known as an officer of the government, and clothed with no authority, could not be declared void in a Court of Law, but that recourse must be had to a Court of Equity? Grants of this description differ essentially from those where the officers had the power and authority by law
to issue the grant, but which grant may have been
(165) obtained irregularly and without conforming to the requisites prescribed by the act of 1777, which irregularity and want of conformity might render the grant voidable by the person injured thereby. Upon this difference Courts of Law have heretofore founded their decisions. In the first class of cases they have received parol evidence and

declared the grants void: 1 Haywood, 376. The trustees of the University *v.* Johnson. But in the second class of cases where the grant has been irregularly issued, they have said that the party wishing to avoid it, must apply to a Court of Equity; that it would be productive of the most dangerous consequences to avoid it by parol testimony. Reynolds *v.* Flinn, 1 Haywood 107. The present case falls within the description of the first class of cases, and it is sufficient to say that in this case and between these parties, and on a title like the defendant's, a Court of Law will receive parol evidence and declare such a grant void, without deciding the general question or any other than the one submitted.

Having declared the power of the Court, upon a trial at law, to receive evidence to shew the defendant's grant to be void, we are next to determine how far the title of the lessor of the Plaintiff will enable him to recover. He claims title under a grant from the state of North Carolina bearing date the 19th day of May, 1803, and founded on an entry made in the year 1791. To ascertain the validity of this grant, it may be necessary to take into view some proceedings of the general government as well as of the legislature of this state relative to the lands allotted to the Cherokee Indians by the act of 1783. The first and most important is the treaty made by William Blount with the Cherokee Indians, on the 2d day of July, 1791, William Blount then being governor of the territory of the United States south of the River Ohio, and superintendent of indian affairs for the southern district. By the fourth article of this treaty, it (166) is declared "that the chiefs and warriors of the Cherokee Nation, for themselves and the whole Cherokee Nation, their heirs and descendants, for a consideration therein expressed, release, quit claim, relinquish and cede all the land to the right of the line therein described." And within the bounds thus ceded is the tract of land in question. In the year 1791, the legislature of North Carolina, passed an act declaring "that a part of Rutherford and Burke Counties should form a separate and distinct county by the name of Buncombe," and particularly describes the boundary lines of said county, which lines include the land covered by the plaintiff's grant. It is further declared by the said act "that the Justices of Buncombe shall have the same powers and jurisdiction as the Justices of the Peace have in any other county in this State." By the provisions

of the act of 1777—Iredell 292, it is made "the duty of the Justices of the Peace of each county to elect an entry taker, who shall receive entries for any lands lying in such county, which have not been granted by the crown of Great Britain or the Lords proprietors of Carolina or any of them in fee before the 4th day of July, 1776, or which accrued or shall accrue to the state by treaty or conquest" Under these provisions the lessor of the plaintiff after the county of Buncombe was formed and the Indian claim extinguished by Blount's treaty, entered with the entry taker of Buncombe County the land in question, and on the 19th of May, 1803, obtained a grant for the same. The validity of this grant is now to be decided, for the plaintiff in this action must recover by the strength of his own title and not through the weakness of his adversary's. To the title thus adduced, two objections are made by the defendant's counsel: first, that the act of 1783 remains unrepealed and in full force, and that the sixth section of that act attaches to this grant with the same force as to the grant set up by the defendant: and secondly, that by the treaty these lands were ceded to the general government and not to the state of North Carolina.

As to the first objection, the answer is, that although (167) the act of 1783 has not been expressly repealed by the legislature, yet it is effectually and substantially repealed by the treaty. The act of 1783, was evidently made to preserve peace with that tribe of Indians, who by the extension of frontier settlements had become near neighbors to the inhabitants of the western part of Burke County, which peace would probably be broken, and the advantages contemplated by the legislature in this donation entirely frustrated, if any individual was suffered to interfere with the rights secured to the tribe by the act of 1783. But when that tribe of Indians voluntarily and for a valuable consideration surrenderad up their claim, no injury could ensue to the Indians by entering those lands: for whether they were occupied or remained vacant was to the Indians a matter of indifference, from the moment of the ratification of the treaty. The reason and policy of the prohibition contained in the act of 1783 ceased, and with it the prohibition itself. The second objection seems to be equally unfounded. These lands having once belonged to the state of North Carolina and having been granted by that state to the use of the Indian Nation revested in the state when that use expired,

and the Indians released all claim to the same. No expression is used in the treaty to convey these lands to the general government: and although the Indian title was extinguished by the general government it does not follow that the title rests in them, for since the adoption of the federal constitution the power of making treaties, is surrendered by each state to the general government and through them alone Indian claims are to be extinguished; and these lands lying within the boundary of this state, acknowledged by the federal government when received into the Union, must remain the lands of this state until she cedes them away; judgment must therefore be entered for the plaintiff.

STONE—*Judge*—The defendant has certainly acquired no title by the grant to him from the state; and with-
(168) out entering into the consideration of the general question, whether parol evidence may be introduced to invalidate a grant on all occasions, this case may be decided upon its own special circumstances. For the evidence which locates and points out a subject for the operation of the grant, at the same time proves that the land which it purports to convey was not, at the time it has date, subject to be so granted. Upon the second point it may be observed that neither the European governments, nor the government of the United States, nor that of North Carolina, have considered the Indian title other than a mere possessory right; and the government of the United States as well as the governments of the several states have claimed and respected in each other the claim to exclusive jurisdiction and title to territory occupied by the Indian tribes. The treaty of 1791, with the Cherokees, cannot be considered, therefore, as conveying a title to the soil of this land to the United States. It can only be received as a relinquishment of that possessory right which alone had been yielded to the Indians. This right did of course vest according to the precedent claims of North Carolina, known and admitted by the United States themselves. It is true the treaty was made by the United States; because by the Federal constitution the general government had been made the agent of North Carolina for that purpose.

Let judgment be entered for the plaintiff.

THE GOVERNOR *v.* HENRY B. HOWARD.

From Wilmington District.

A sold to B a negro slave, knowing that the slave had been imported into this State, contrary to the act of 1794, ch. 2.

This was an action of debt brought on the second section of the act of 1794, ch. 2, to recover from the defendant the penalty of one hundred pounds for selling to
(169) Benjamin Smith a negro slave imported into the state contrary to the provisions of said act, knowing him to have been so imported. The defendant pleaded the general issue. The Judge charged the jury, that if the evidence adduced, satisfied them, that the defendant knew of the illegal importation at the time of his sale to Smith, they should find a verdict for the plaintiff, although it should appear that the defendant purchased the said slave honestly and without knowledge of the importation. The jury found a verdict for the plaintiff, and the defendant having obtained a rule to shew cause why a new trial should not be granted, on the ground of misdirection by the court, the case was sent to this court for the opinion of the Judges.

A. Moore, Jr., in support of the rule. The act of 1794, ch. 2, sec 2, declares "that every person importing or bringing slaves or indented servants of colour into this state after the first day of May the next ensuing, by land or water, contrary to the provisions of this act, shall forfeit and pay the sum of one hundred pounds for each and every slave or indented servant of colour so imported or brought. And every person who shall knowingly sell, buy or hire such slave or indented servant of colour, shall in like manner forfeit and pay the sum of one hundred pounds for each and every slave or servant of colour so sold brought or hired: one moiety to him or them who shall sue for the same; to be recovered in the name of the governor for the time being, by action of debt, in any of the Superior Courts of Law in this state." The defendant is charged with the forfeiture for having knowingly sold to Smith a slave imported contrary to the provisions of this act. He rests his defence upon this ground, that he was an honest purchaser of the slave without notice of his illegal importation, and that a sale to Smith under subsequent notice of this fact did not incur the forfeiture. If the act intended to restrain men in the use and disposition of their property

honestly acquired, it does not consist with the genius
(170) and spirit of our constitution. By this instrument the free enjoyment of personal liberty and private property is guaranteed to each individual; and if the legislature can restrain the citizen in the use and disposition of his slaves, a similar restraint may be imposed as to his beasts of burthen and other property, until he shall literally have no free agency in the management of his estate. If once the principle be admitted, that the legislature have the right to control the citizen in *the use* he is to make of his property, all ownership is gone. The existence of such a right would enable the legislature to say, you shall not sell your negro slave, nor hire him; you shall not use him in making tobacco, rice or cotton; in short, not use him at all. If the right of ownership be once invaded, where is the power which can limit the extent of this invasion? And where is the evil that can result from this uncontrolled exercise of ownership? If I use my property to the damage of an individual, he has his remedy; if to that of the public, the state holds the rod to correct me. What views have we in acquiring property? It is the comfort it affords; and it affords that comfort from the various shapes it is capable of assuming, as our exigencies may require.

But it is useless to combat a construction of the act which the legislature never intended it to receive. The object of the act was to put an end to the practice of bringing slaves and indented servants of colour into this state. We are therefore to interpret the words of the act entirely with a view to the furtherance of this object, rejecting every interpretation which does not directly lead to this point. If A bring a negro into the state and sell him, he is liable to the penalty of the act, either under the word *importer* or *seller*. He is liable, because he has occasioned the evil which it was the object of the act to prevent. But if A sell to B and B to C, can it be pretended that the same thing holds with respect to them? They are sellers, too, but are they such sellers as contribute to the evil? The negro was already in the country be-
(171) fore B or C purchased and sold him. The act intended to punish those sellers only who contributed to the evil intended to be suppressed. If the seller aids and connives at the illegal importation, it is immaterial how many transfers shall take place before he makes a sale; he incurs the forfeiture, because by his artifices and contrivances he

contributes to the evil. But unless it appear that the seller has contributed to the evil by some agency or connivance at the negro's introduction into the state, he is no offender, he incurs no forfeiture. Without this distinction, the innocent would be placed on the same footing with the guilty.

It is unnecessary to pursue the construction of the act as to *purchasers* and *hirers;* the same principles of construction extend to them as to sellers. In construing an act of the legislature, the professed object of which is to suppress an existing evil, arguments "*ab in convenienti*" should have their full weight, that such construction may not be given as will induce greater evils than that which the act proposes to remedy. If the construction given to this act upon the trial of this cause in the court below, be correct, what will be the situation of a sheriff who levies an execution upon a slave, advertises him for sale and before the day of sale is informed that the slave has been imported contrary to this act? If he sell, he incurs the forfeiture; if he does not sell, he is answerable to the plaintiff in execution. What would be the situation of a guardian, to whose ward, slaves illegally imported have been allotted in the distribution of the ancestor's estate? The law directs the guardian to hire out those slaves until his ward shall arrive to age; yet he cannot hire without incurring the forfeiture of the act. Many other cases might be put of the same kind. All these inconveniences will be avoided by giving to the act the construction contended for on behalf of the defendant. It is sub-
(172) mitted whether the rule for a new trial should not be made absolute.

BY THE COURT—Let the rule to shew cause why a new trial should not be granted be made absolute.

JUDGES OF THE SUPREME COURT

OF

NORTH CAROLINA,

DURING THE YEAR 1808.

JOHN LOUIS TAYLOR, Esquire,
JOHN HALL, Esquire,
FRANCIS LOCKE, Esquire,
*DAVID STONE, Esquire,
*SAMUEL LOWRIE, Esquire,
†BLAKE BAKER, Esquire.

HENRY SEAWELL, Esquire, Attorney General.
EDWARD JONES, Esquire, Solicitor General.

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* Judges Lowrie and Stone were absent at this term.

† The Honourable Spruce M'Kay, Esquire, having died since the rise of the last General Assembly, Blake Baker, Esquire, was appointed to his place on the bench, by the Governor and Council, and took his seat in the Supreme Court at this term.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JULY TERM, 1808.

BACKHOUSE *v.* SNEED.

From Newbern District.

A being the owner of a vessel "lately completely repaired" took on board for freight 270 bushels of corn. The rudder was broken by the sea, the vessel wrecked and the corn lost. The rudder presented an external appearance of soundness, but was internally rotten. And that fact not known to A—He is liable for the loss of the corn.

The defendant sailed from the port of Wilmington to that of Topsail, both in this state, in a small schooner owned and commanded by himself and on a voyage for his own benefit, having on board property belonging to himself. At Topsail he was induced by request of plaintiff to proceed with his cargo to Swansborough, and to take on freight for the plaintiff two hundred and seventy bushels of corn. Defendant sailed for Swansborough, but was compelled by stress of weather to put in at New River and to stay there two days.

In going out, the rudder of the schooner was broken
(174) by the sea on the bar of New River Inlet: the vessel consequently went on shore, was wrecked and her cargo lost. It appeared in evidence that the vessel had lately been completely repaired by a skilful workman; but the rudder though presenting an external appearance of soundness, was internally rotten, and that the breaking of the rudder was owing to its rotten state. This defect of the rudder

was not proved to have been known to defendant. No evidence was given nor was it pretended that defendant had ever before this occasion, carried goods for freight.

The jury under charge of the court found a verdict in favour of the plaintiff for the value of the corn, and it is submitted to the court of conference upon this statement whether a new trial should not be awarded.

J. STANLY, *For Pl'ff.*
W. GASTON, *For Def't.*

TAYLOR, *Judge*, delivered the opinion of the Court—Whatever doubts formerly prevailed as to the extent of a carrier's responsibility, the law seems now to be well settled that he is liable for all losses except such as happen by the act of God or the enemies of the state. All accidents which can occur by the intervention of human means, however irresistible they may be, he is considered as insuring against. And this was held to be law, although the charge of negligence stated in the declaration was expressly negatived. Forward *v.* Pittard, 1 Term Rep. 27. The principle of this liability seems to be, the public employment which carriers exercise, so that persons induced to confide in them in the course of business may receive all possible security—Coggs *v.* Bernard, 2 Ld. Ray. 117.

A stronger case cannot well be put than that of Dale *v.* Hale cited from 1 Wills, 281, in which it was holden to be no excuse that the ship was tight when the goods were placed on board, but that a rat by gnawing out the oakum had made a small hole, through which the water had
(175) gushed. Sir William Jones in discussing this subject in his law of bailments, seems to consider that the exception as to the act of God and public violence is in truth part of the rule, and that the responsibility for a loss by robbers is only an exception to it, founded on a maxim of policy and good government to prevent confederacies between carriers and robbers. He holds that a carrier is regularly liable for neglect, and that such is the true principle of the decision in the case of Dale *v.* Hale, although it is not mentioned by the reporter. Lord Mansfield in the case of Forward *v.* Pittard concurs in the opinion of Sir William Jones as far as it extends, but in addition to the negligence for which he is liable and may be sued on his contract, he holds that a carrier is in the nature of an insurer by the cus-

tom of the realm, that is, by the common law: so that his contract binds him to due care and diligence; and even with the best care and diligence the common law applied to the nature of his employment, renders him responsible for inevitable accidents, if not occasioned by the act of God.

Admitting however that a carrier was liable only to the extent of his contract and that ordinary negligence must be proved against him in order to recover for a loss, it may be asked whether if such negligence may be imputed in the case of Dale *v.* Hale, the charge is not at least as well grounded in the present case. It certainly was as easy to guard against the defectiveness of the rudder by a proper examination, as to prevent a hole being made in the bottom of the vessel in the other case, where the hold was charged with goods and the vessel pursuing her voyage. The declaration however in the case cited was founded on the contract and not on the custom, and the Chief Justice says that everything is negligence that the law does not excuse. Judgment for the plaintiff.

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(176)

JOHN BATEMAN *v.* JOHN MARINER AND WIFE.

From Edenton District.

The testator signs his will: it is then attested in his presence by one witness. Testator inserts the "date" and the words "my dearly beloved," and has it attested in his presence by another witness. Testator then acknowledged the execution of the will in presence of both witnesses. This is a valid execution and good to pass testator's real and personal estate.

The testator signed this will and it was attested in his presence by Levi Bateman. The testator then inserted the date and the words "*my dearly beloved:*" he then caused it to be attested in his presence by Woolsey Hathaway, and afterwards acknowledged in the presence of both of the witnesses, that it was his act and deed for the uses therein mentioned. It was submitted to the Supreme Court to decide whether this Will was good to pass the real as well as the personal estate of the testator.

LOCKE, *Judge*, delivered the opinion of the court. The

Will being signed by the testator in the presence of one witness and afterwards acknowledged in the presence of the other and finally acknowledged in the presence of both has been executed with due solemnity and in a fair and valid manner: And although the testator in the interval between the attestation of the first and second witness, inserted these words "*dearly beloved*," and also the date to the Will, yet this addition being wholly immaterial, produces no alteration therein. The court is therefore of opinion that the Will has been well executed and is sufficient to pass both the real and personal estate therein mentioned.

YOUNG, ALSTON & CO. *v.* WELDON'S REPRESENTATIVES AND DEVISEES.

From Halifax District.

The whole estate of a deceased debtor being liable to the creditor, if owing to the removal of one or more of the legatees from this state, or any other cause, the estate of the testator in his or their hands cannot be reached by the creditor here, the other legatees within the reach of the process of the court are liable to the creditor for his whole debt, if their legacies amount to so much—and if one legatee pay more of the testator's debts than another, it is a question of contribution between him and the other legatees.

This bill was filed in the Court of Equity for Halifax district, against the representatives and devisees of Samuel Weldon, deceased, praying that they might be decreed to pay to complainants the amount of a debt which the said Samuel owed to them at the time of his death. The court having directed an account to be taken by the master, of
(177) the principal and interest of the debt due to complainants, and also the value of the several legacies bequeathed to the defendant by the said Samuel in his last will; and the master having made his report, the cause came on to be heard upon the bill, answers, exhibits and master's report; when the court decreed that the complainant recover from the defendants the sum of three hundred and eighty pounds with interest till paid, and that executions issued against Benjamin Weldon, administrator of Penelope Simmons, for the sum of £126 13 4; against William Weldon for the sum of £42 4 6; against Benjamin Weldon for the

sum of *L*42 4 6; against Penelope Weldon for the sum of *L*84 8 10; and against John Carter and Martha, his wife, for the sum of *L*84 8 10; the same being their respective proportions of the said debt, due regard being had to the amount of their several legacies from the personal estate of said testator—And the cause was ordered to be retained for further directions, in case any of the said defendants had become insolvent, or removed themselves and their property out of this state; or any other cause whereby the complainants could not have the effect of their execution against them: It was also ordered that the defendants pay the costs in the same proportion as the debt.

At a subsequent term it being moved on the part of the complainants, in consideration of the removal from this state of Benjamin Weldon (who was the administrator of Penelope Simmons) and who was also subjected by the above decree to the payment of the several sums therein mentioned, that the other parties now within the reach of the process of the court, should be made liable for their shares, if the property which they had received should amount to so much, it was referred to this court for judgment thereon.

TAYLOR, *Judge*, delivered the opinion of the court. Nothing appears in this case to shew any consent on the (178) part of the complainants to relinquish the claim which they have against the defendants, who are chargeable in respect of the property they have as legatees. The whole fund is liable to the creditor, and if any one of the legatees pay more than his proportion, it becomes a question of contribution between him and the others; but is no answer to the creditor, while any thing remains of the testator's property in his possession. It is very proper for the court to adjust these proportions for the convenience of the parties, but if one legatee remove his share out of the reach of the creditor and without his connivance, he has an undoubted right to procure satisfaction from the others. The motion of complainants must therefore be allowed.

NEWNAN *v.* NEWNAN.

From Rowan.

An appeal bond cannot be legally executed after the rise of the county court, nor will the appeal be sustained unless the bond is executed in the county court—The superior court cannot take a bond to sustain an appeal.

The plaintiff prayed an appeal from the judgment of the County Court of Rowan, but did not execute an appeal bond until after the rise of said court. The transcript of the record was filed with the clerk of the Superior Court and the defendant's counsel moved to dismiss the appeal, upon the ground that the appeal bond had not been legally executed; and the plaintiff moved for leave to execute an appeal bond in that court. The case was sent to this court upon the question whether an appeal bond, taken after the rise of the County Court, is good to sustain the appeal; if not, whether the Superior Court can take a bond to sustain it?

LOCKE, *Judge*, delivered the opinion of the court. The act of Assembly regulating appeals from the County to the Superior Court declares, "that all persons dissatisfied with the judgment of the County Court, shall be entitled to an appeal to the Superior Court; but before obtaining the same shall enter into bond with two sufficient securities for (179) prosecuting the same with effect." It seems therefore that the County Court have no power or authority to grant an appeal, until they have received from the appellant a bond and adjudged that the security offered is sufficient. If therefore the party fail, during the sitting of the court, to obtain an appeal by executing a bond according to the provisions of the act, he is precluded forever thereafter from obtaining the same. The court is therefore of opinion that this bond being executed after the rising of the County Court, the appeal intended to be prosecuted thereon cannot be sustained; and that the Superior Court have no authority to take a bond to sustain it. The appeal must therefore be dismissed.

BLACKLEDGE *v.* SCALES.

From Rowan.

A receives money for B and pays it to C, who says he is authorised by B. to receive it—B sues A for the money. C is a competent witness to prove that B authorised him to receive the money of A.

This was an action brought to recover money had and received by defendant to the use of the plaintiff. Defendant being deputy sheriff of Rockingham county, received an execution at the instance of the plaintiff against one Patterson, upon which he received the money claimed by the plaintiff in this action. Defendant alleged that he had paid the money to the plaintiff, &c. And to prove the payment he offered in evidence the receipt of Alexander Tate for the money, saying that Tate had been authorised by the plaintiff to receive it; and the principal question in the case was, whether Tate could be examined as a witness to prove that plaintiff had authorised him to receive the money of defendant. No written authority to receive it, was given to Tate.

BY THE COURT—We are of opinion that Tate is a competent witness to prove that plaintiff had authorised him to receive the money of defendant, on the ground that he is equally liable, let the judgment be for or against the plaintiff—Espinasse's Rep., 332—For should the plaintiff
(180) recover against Scales, then Scales would recover of Tate; and if plaintiff cannot recover against defendant, then he would be entitled to recover against Tate; so that as between the parties he stands indifferent.

TURENTINE *v.* MURPHEY.

From Orange.

A creditor is not liable for the maintenance of his debtor in jail upon a *ca. sa.* unless he discharges the debtor, and the debtor be unable to pay for such maintenance.

This was an action brought by the plaintiff as keeper of the public jail of Orange county to recover of defendant the amount of certain prison charges which had accrued by the detention in prison of one Joseph Street, confined at the instance of the defendant upon a writ of *capias ad satisfa-*

ciendum. It was agreed that Street was at the time of his commitment and still continued to be possessed of property more than sufficient to pay for his own maintenance. He was in prison upon the writ aforesaid when this action was brought: and the question submitted to this court was, whether the defendant was liable to the plaintiff for the maintenance of Street, in prison?

BY THE COURT—We are not aware of any law by which the defendant in this instance is liable to pay for the maintenance of a prisoner committed on a writ of *capias ad satisfaciendum.* The act of 1773, ch. 4, sec. 9, relied upon for the plaintiff, seems alone to contemplate a case where the party at whose instance the prisoner is confined, thinks proper to discharge him and he should prove unable to pay his fees. But as this case states the prisoner to be fully able to pay his fees, and that he has never been discharged by defendant, the court can perceive no ground on which the defendant can be made liable to the plaintiff's demand.

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(181) SWEANY *v.* HUNTER.

From Johnson.

A witness summoned in a suit failed to attend—he was called out, his forfeiture recorded, and judgment nisi entered against him. The party at whose instance he was summoned promised that if he would attend the next term and give his testimony, the forfeiture should not be at enforced against him. He did attend, but the forfeiture was enforced. He brought this suit to recover damages for breach of the promise. The promise is without consideration, as it was only to induce the plaintiff to do that which it was his duty to do, without reward, except such as is allowed to witnesses for their attendance.

The plaintiff was summoned as a witness for the defendant in a suit brought by him against one Jesse Mitchell, and failing to attend pursuant to the subpœna served on him, he was at June term, 1800, of Johnson county court, called out and judgment *nisi* for the forfeiture, given by the law for his failure to attend, was entered against him. Afterwards it was agreed between the plaintiff and defendant, that if plaintiff would attend at the next term of the court and give his testimony, the defendant would save him harmless as to the forfeiture aforesaid. The plaintiff did attend at the next

term and gave evidence and the case was tried; after which defendant sued out a scire facias against plaintiff upon the conditional judgment aforesaid: to which scire facias the plaintiff pleaded that he had not been subpœned. The jury found against the truth of this plea: the judgment was rendered absolute upon the scire facias, execution issued, plaintiff's lands were sold, execution satisfied and the money paid to defendant. This suit was brought to recover damages for the breach of the agreement aforesaid, and it was submitted to the supreme court to decide whether there was a sufficient consideration to support the promise made by defendant to save plaintiff harmless as to the forfeiture?

LOCKE, *Judge*, delivered the opinion of the court. To ascertain whether there is a sufficient consideration in this case to support an assumpsit, it is first necessary to examine whether the plaintiff was not bound to attend the court by operation of the subpœna, and without any additional recompence or reward. The act of 1777, ch. 2, declares "that every witness being summoned to appear in any of the said courts in manner as herein before described, shall appear accordingly and continue to attend from term to term until discharged by the court, or the party at whose instance
(182) such witness shall be summoned; and in default thereof, shall forfeit and pay to the person at whose instance the subpœna issued the sum of fifty pounds, and shall be further liable to the action of such party for the full damages which may be sustained for want of such witness' testimony; who shall recover the same by scire facias with costs." From this section the court infers, that to enforce the attendance of a witness at each and every term during the continuance of the suit, it is only necessary that he should be subpœned once; and if he fail and is called out, the forfeiture of fifty pounds does not release the witness from an obligation to attend at the subsequent term. And this inference the court draws from two considerations: first, because the law declares, that he shall continue to attend from term to term until discharged by the court or the party at whose instance he was summoned; and is altogether silent as to the forfeiture operating to release him; it states expressly how long he shall attend under the subpœna and how he is to be released—and secondly, because the damages which the act gives the remedy to recover against the witness, could

never be obtained or enforced, if upon the first default made by the witness, calling him out upon his subpœna, was to release him from further attendance. Nor until he was examined upon the trial of the cause, few instances would occur in which the plaintiff would be enabled to ascertain what the witness could have proved had he attended, and what proportion of damages he sustained on account of his non-attendance; and if he is to be discharged upon the first forfeiture, the plaintiff would be deprived of this additional remedy. But if the construction given by the court to the act of assembly be correct, the remedy is easy and the proof plain. Suppose a witness to be so material, that on his testimony alone, a particular point in the cause can be supported, and he fails to attend pursuant to the subpœna served on him: he is called out, the plaintiff compelled to suffer a non-
suit by reason of his non-attendance, or to continue
(183) the cause, or being non-suited, prays to have the non-
suit set aside and the cause re-instated, which is granted to him upon payment of all costs up to that time: at the next term the witness attends, the cause is tried, and the plaintiff recovers—surely the plaintiff would be entitled to recover these costs by way of damages sustained by him from the absence of the witness. But it is said that the part of the act can still be enforced by taking out a second subpœna—this would expose the plaintiff to more trouble and expense than the law intended to impose upon him; and if the legislature had intended to expose him to this trouble and expense, they would have expressed such intention; but they have expressly said the contrary by compeling the witness to attend until discharged under one subpœna. Suppose the mode of suing out other subpœnas upon the default of witnesses was adopted, and in a case where there might be twenty witnesses; each witness fails to attend for two or three terms and is called out at each court, and new subpœnas are issued, the plaintiff finally recovers: would it be just or fair to make the defendant pay for all these subpœnas? or would it be any object to the plaintiff to bring an action on the case against each witness to recover the costs of single subpœna? If not, then this additional expense is to be incurred by the plaintiff, who has obtained his judgment and who, the law intends, should recover all his costs. The court is therefore of the opinion that this witness was under an obligation to attend the courts without any addi-

tional reward, and by virtue of his subpœna; and if so, the promise on which this suit is brought is without consideration, and must be regarded as a *nudum pactum*. It is a rule well settled, that an assumpsit will not lie to recover money promised for doing that, which it was the party's duty to do without reward—2 Bur. 924. Statesbury *v.* Smith. Judgment must be entered for the defendant.

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(184) LEDBETTER *v.* LOFTON, Adm'r of DUNN.

From Rowan.

Affidavits may be read to support the affidavit on which the writ of certiorari was granted as well as to contradict that of the defendant to the writ, and depositions taken in a suit then pending between the same parties may be read upon a motion to dismiss the certiorari.

A Certiorari was obtained by Ledbetter to repeal Letters of Administration granted to the defendant Lofton on the estate of Allen Dunn, deceased. The Certiorari was obtained pending a suit brought by Lofton as Administrator of Dunn against Ledbetter to recover sundry negroes in the possession of Ledbetter, in which suit several depositions had been taken. The Certiorari was obtained upon the affidavit of Ledbetter, who set forth that the letters of administration had been granted to Lofton by the County Court of Montgomery, and after stating the facts upon which the application to repeal the letters was founded, he prayed that a writ of Certiorari might be granted, to be directed to the Sheriff of Montgomery, commanding him to go to the justices of the Court of Pleas and Quarter Sessions for Montgomery county and to the Clerk of said court and cause them to certify the record of granting of letters of administration of the estats of Allen Dunn, deceased, to Lewis Lofton, to the Judges of the Superior Court of Law for the District of Salisbury. Upon the return of this writ of Certiorari into the Superior Court of Law for Salisbury District, Lofton filed his affidavit contradicting many of the facts contained in the affidavit of Ledbetter and moved that the Certiorari be dismissed. Upon which the counsel for Ledbetter moved for leave to offer to the court affidavits to support the affidavit of Ledbetter upon which the Certiorari had been granted, and also to contradict the affidavit of Lofton. A motion was likewise made

to read to the court certain depositions taken in the suit aforesaid. And the following questions were ordered to be sent to this court for decision.

First, Whether affidavits filed at or after the return of the Certiorari can be read to support the affidavit upon which the Certiorari was granted?

2d. Whether affidavits filed at the same term can (185) be read to contradict the affidavit of Lofton.

3d. Whether the depositions taken in the suit wherein Lofton administrator of Dunn was plaintiff and Ledbetter was defendant, previous or after the Certiorari was granted, can be read in this case.

BY THE COURT—We are of the opinion that affidavits may be read to support that on which the Certiorari was granted, as well as to contradict that of Lofton; and that the depositions stated in the case may also be read.—(a)

Den on Demise of the TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA *v.* CAMPBELL.

From Orange.

Neither the act of 1800, repealing the laws granting escheated lands to the trustees of the University, nor bringing a suit by the escheator under the act of 1801, suspends the statute of limitations as to the trustees whose right was sought to be divested by those acts.

This was an enjectment for a house and lot in the town of Hillsborough. Andrew Watson, of North Britain, was seized of the said lot, and he dying without leaving any person in the United States capable of taking from him by descent, the lot escheated and vested in the trustees of the University under the act of 1791, which granted to the said trustees all the lands within this state which had escheated or should thereafter escheat. The lot in question escheated previous to the year 1800, in which year the legislature passed an act declaring "that all acts and clauses of acts which before that time granted power to the trustees of the University of North Carolina to seize and possess any escheated or con-

(a) *Note.*—This case was subsequently referred to this court upon the question whether proceedings to repeal letters of administration ought not to commence in the court which granted the letters—and the Court held that they ought, and therefore dismissed this Certiorari—Vide cases of July term, 1809.

fiscated property, real or personal, were thereby repealed and made void: and that all escheated or confiscated property which the said trustees had not legally sold by virtue of said laws should revert to the state and be con-
(186) sidered the property of the same as though the said laws had never been passed." The legislature at the next session, in 1801, passed an act directing the Judges of the Superior Courts to appoint escheators and commissioners of confiscated property, whose duty it should be to sue for and reduce into possession all escheated and confiscated property, to the use of the state. Under this act Henry Sheppard was appointed escheator, for Hillsborough District, and instituted suit against the defendant for the lot in question. Pending this suit, the case of the Trustees of the University against Foy was decided in this court, in which this court decided that the act of 1800 aforesaid was unconstitutional and void, and that the rights granted to the trustees by the act of 1791, remained unimpaired. In consequence of this decision, Sheppard dismissed the suit aforesaid which he had instituted on behalf of the state, and the Trustees of the University brought the present suit. More than seven years had elapsed from the time of the escheat to the commencement of this suit, during which time the defendant and those under whom he claimed had possession of the lot under color of title. And it was agreed that in this case the statute of limitations barred the right of entry in the lessors of the plaintiff, unless the said statute was suspended in its operation as to them, either by the act of 1800, or by the commencement of the suit aforesaid by Sheppard at the instance of the state under the act of 1801. And it was referred to this court to decide whether the statute of limitations was suspended as to the lessors of the plaintiff by both or either of these events.

TAYLOR, *Judge*, delivered the opinion of the court. In deciding this case against the plaintiffs, we cannot but feel the extreme rigor and hardship which result from the application of a rule of law, which, however, we are bound to administer, we have no power to relax. We should seize with avidity any solid ground or principle upon which we could consider the act of limitations to be suspended;
(187) because the forbearing to sue has arisen from deference to a legislative act, which until it was submitted to

a judicial examination was believed to be obligatory upon the plaintiffs. But we know of no authority which will warrant us in adding this to the exceptions contained in the act of limitations. Nor do we conceive that a suit being instituted on behalf of the state by the escheator will create a difference; for that claim was opposed to the claim of the trustees and was in consequence of the law by which their title was sought to be divested.

WOODFORK *v.* BROMFIELD.

From Stokes.

The return of two nihils good service of a scire facias against bail.

Woodfork was bail for one Samuel Robinett in an action brought against him by Bromfield in Stokes County Court. Bromfield obtained judgment and sued out a *capias ad satisfaciendum* against Robinett, which was returned by the Sheriff of Stokes "*not found.*" A *scire facias* was then issued against Woodfork the bail, which was returned "*not found.*" An alias *scire facias* was issued, which was also returned "*not found.*" Whereupon Bromfield signed judgment against Woodfork "according to *scire facias*," and sued out an execution. Woodfork brought a writ of error to reverse this judgment, and the error assigned was "that the *scire facias* upon which the said judgment was rendered was *not made known* to Woodfork, the bail." And it was referred to this court to decide whether there be error to reverse the judgment.

BY THE COURT—The act of Assembly which gives the *scire facias* against bail, says "that no execution shall issue thereon until the same shall be made known to him." What shall be considered a sufficient *making known*, is a question of law, and it will be found in 4 Bac. Abr. 422. That the (188) return of *two nihils*, is considered as such: and the practice being uniform upon this point, we think it ought not now to be altered; especially as the plaintiff would thereby be without a suitable and just remedy in cases where the bail should abscond, as no attachment would lie until there was a judgment against him; and it has been held that no suit can be brought upon bail bond.

PEACE AND KITTRELL *v.* PERSON AND GORDON, Bail of MORRIS.

From Granville.

Surrender of the principal by his bail at any time before final judgment upon the scire facias, discharges the bail from the costs of the scire facias. A witness summoned by each party to a suit is entitled to compensation from each.

The plaintiffs recovered a judgment against Morris, in Granville County Court, and after the return of a *capias ad satisfaciendum* against him, they sued out a *scire facias* against the defendants who were the bail of Morris: upon which *scire facias* the plaintiffs obtained judgment, from which the defendants appealed to the Superior Court of said county; and the transcript of the record being filed with the Clerk of the Superior Court, the defendants brought Morris into court and surrendered him in discharge of themselves. The plaintiffs admitted the surrender, prayed the body of said Morris into custody and judgment against the defendants for the costs on the *scire facias* up to the time of the surrender, which was objected to by the defendants

In this case each party had summoned the same person as a witness, who moved the court to prove his attendance against each; and two questions were referred to this court: first, whether the plaintiffs were entitled to judgment against defendants for costs upon the *scire facias* up to the time of the surrender; and secondly, whether the witness summoned by each party was entitled to compensation from each.

(189) BY THE COURT—The surrender of the principal being an effectual discharge of the bail, subjects the plaintiffs in the action to the costs. For the act of Assembly provides, that the party cast shall pay the costs. Had the surrender been put in issue and found for the defendant this must have been the consequence, and the same effect must follow if the plaintiff, knowing that the surrender can be established, surceased his *scire facias*.

A witness summoned for both parties is entitled to compensation from both; his delinquency would expose him to forfeitures at the instance of both; it is but just that his punctuality should benefit him.

THE EXECUTORS OF ALLEN *v.* WATSON.

A bequeathed negroes and other personal property to his wife during her life; and after her death to be sold and equally divided among his children. After her death, B converts the property to his own use—the executors of A can bring Trover for this conversion.

This was an action of Trover brought for certain horses, cattle and sheep bequeathed by the plaintiff's testator to his widow, in the words following, to wit, "I give and bequeath unto my beloved wife Elizabeth Allen, six negroes, to wit, Idy, Fib, Nazora, old Jack, Nimbri and Squire: also, three horses, one by the name of Voltaire, one by the name of Brandy, and one by the name of Ball: also ten cows and calves, eighteen head of sheep, four feather beds and furniture, and four lots in the town of Smithfield known and distinguished by the Numbers 8, 9, 10 and 11; during her natural life, *and after her decease to be sold and equally divided among my children.*" After the death of Elizabeth Allen, the widow, the defendant converted the personal property, mentioned in the above bequest, to his own use. The defendant at the time of the conversion was Guardian to four out of five of the testator's children. It was contended on behalf of the defendant that the executors of Allen after their assent to the bequest for life, had no property in the articles converted, and could not bring Trover to recover damages for
(190) the conversion; and it was referred to this court to decide whether the plaintiffs can support this action.

TAYLOR, *Judge*, delivered the opinion of the court. The evident construction of this Will is, that after the life-estate is exhausted, the executors shall sell the property for the benefit of the children. The assent operates only upon the life-estate; because before the remainder can vest in the children, a sale must take place: It is the circumstance by which this case is distinguished from the common cases, where an assent to the first taker vests the property in the remainderman. The executor must be considered as trustee for the purposes of the sale and distribution amongst the children, and therefore have a right to recover. Judgment for the plaintiff.

SAWYER *et al. v.* TRUEBLOOD'S EXECUTORS.

A bequeaths personal property to his five daughters, naming them, "to them and their disposal." Three of the daughters die in the life time of testator. The shares given to the three who die are to be distributed among the next of kin of testator and do not survive to the other two daughters.

Josiah Trueblood by his Will bequeathed one half of his moveable estate to his wife Elizabeth during her natural life, and gave "*to his daughters, Ruth, Mary, Sarah, Elizabeth and Anne, all the remaining part of his moveable estate, to them and their disposal.*" The daughters Mary, Sarah and Anne died in the life time of the testator. Ruth and Elizabeth intermarried with the plaintiffs Sawyer and Relf, and claimed of the defendants that part of the residue of the estate, bequeathed to the three daughters who died in the life time of the testator; and it was referred to this court to decide whether that part of the residue so bequeathed to the three daughters who died as aforesaid, had lapsed and become subject to be distributed among the next of kin, or vested in the complainants as survivors.

TAYLOR, *Judge*, delivered the opinion of the Court. There being no words of severance in the devise to the daughters, it would at common law have been a
(191) joint tenancy; but by the act of 1784, it is converted into a tenancy in common. Each of the daughters then had a fifth of the residue bequeathed to her in common, and the shares of those who died in the life time of the testator must be considered as so much of the testator's property undisposed of by will. As to those the bequests have become void and cannot be claimed by the survivors.

WEST *et al. v.* COKE, Administrator of BLAND.

From Caswell.

After the answer to an injunction bill has been filed, the bill cannot be amended before the hearing. Affidavits will not be received by the court to support the allegations of an injunction bill.

Complainants filed their bills in the Court of Equity for Caswell county, for the purpose of enjoining a judgment at law recovered against them by the defendant. An injunc-

tion was granted and the defendant put in his answer. The cause came on to be heard upon the bill and answer, and defendant's counsel moved to dissolve the injunction; the counsel for the complainants moved to amend the bill and also to read to the court sundry affidavits in support of the facts charged in the bill. The defendant's counsel had no previous notice of this motion to amend and read affidavits; and it was referred to this court to decide whether upon the hearing of this bill and answer, the court will allow complainants to amend the bill or to read affidavits of other persons in support of its allegations.

BY THE COURT—After the answer to an injunction bill has been filed, the bill cannot be amended before the hearing, particularly, if no previous notice of the amendment be given to the defendants. To permit such amendment would introduce improper delays in injunction causes and other mischiefs which ought to be avoided. Nor will the court permit the complainant to support his bill by affidavits of other persons. It has been the constant practice of the court to decide injunction causes upon the bill and answer; (192) and although, in some instances this practice may produce an injury to a complainant, it has been found to be salutary. The defendant has a judgment at law, and if he swears away the equity of complainant's bill, the injunction must be dissolved and the law take its course.

RUTH GIVINS *v.* EDWARD GIVINS'S EXECUTORS AND DEVISEES.

From Salisbury District.

Testator directs his debts to be paid out of his personal estate; charges his real estate with the maintenance of his wife; gives £1,000 to an only daughter, and after giving other pecuniary legacies, he gives the remainder of his estate to his three sisters—the personal estate is exhausted in the payment of debts; the legacy of £1,000 to the daughter is a charge upon the real estate.

The complainant filed a bill in the Court of Equity for Salisbury district against the executors and devisees of Edward Givins, deceased, to compel the payment of a legacy of one thousand pounds given to her by the said Edward in

his last Will. The personal estate had been exhausted in the payment of testator's debts, and the question sent to this court was, whether the legacy claimed by complainant was a charge upon the real estate. The testator after directing his just debts and funeral expenses to be paid out of his personal estate, gives to his wife one thousand pounds, and charges his real estate with her maintenance; then follows the bequest to complainant: "I give and bequeath to my daughter Ruth one thousand pounds." He gives a few other pecuniary legacies, and then gives all the remaining part of his estate to his three sisters. The complainant was testator's only daughter.

A. Henderson, for the complainant, contended that the legacy to the complainant is a charge upon the real estate of the testator. The residuary clause of the will vested in the three sisters a fee simple in the lands. In Cowper 174, it was held that a demise of "all the remainder and residue of *all the effects, both real and personal*," pass a fee simple: and in 2 Atk. 38, that the word "*estate*" was sufficient to pass not only the land, but all the interest the testa-
(193) tor had. Debts and legacies stand upon the same footing in charging real estate—2 P. Wms. 190, note 2—3 Ves. jun. 551. In the case of Trott and others *v.* Vernon, 2 Vern. 708, the testator devised, "that all his debts, legacies, and funeral expenses should be paid and satisfied in the first place," and then disposed of his real and personal estate. The court held that the land was charged. So, where the testator devised his land to his brother, who was his heir at law, and gave certain legacies, and appointed his brother executor, desiring him to see his will performed; the real estate was charged with the legacies—2 Vern. 228. So where the testator devised all his lands to A. and the heirs of his body, remainder over; and in another part of his will devised to A. all his personal estate, and made him executor, willing him to pay his debts; this was held to be a charge upon the lands as well as upon the personal estate—1 Ves. 411—Prec. Ch. 264—1 Ves. 500—2 Ves. 271, 313—Eq. Ab. 198, *a.*—1 Ves. 45. And in a late case, where testator devised that his debts be paid, and then devised his real estate, the Court held that the real estate should be subject to the debts.

TAYLOR, *Judge*, delivered the opinion of the Court:

The testator directs the fund out of which the wife's maintenance shall be made, but is silent as to the pecuniary legacies. He is also particular in requiring his debts to be paid out of his personal estate; and this furnishes some implication, that he did not also mean to render that liable to the payment of the legacies. But when he devises the remainder of his estate to his sisters, &c. the necessary construction is, that they shall be entitled to whatever is left after the payment of his debts as well as legacies. It would be unreasonable to give the will such a construction as would give the sisters their residuum, and deprive the daughter, an only one, of her pecuniary legacy; more especially when it can-
(194) not be collected from the will, that any intention of that sort was entertained by the testator.

BENZIEN *et al. v.* LENOIR *et al.*

From Iredell.

1. Deeds executed in England, for lands in this State, were proved before the Lord Mayor of the city of London, and the probate thereof certified under the seal of the Mayoralty. They were then transmitted to this State, and arrived in the year 1771, but not registered within twelve months thereafter. They cannot be read in evidence under the act of 1715, ch. 38; as that act requires them to be registered within twelve months *after their arrival.*
2. But the act of 1770, ch. 7, having declared, "that all deeds, &c. not already registered, acknowledged, or proved, shall and may within two years after the passing of this act, be acknowledged by the grantor, &c. or proved by one or more of the subscribing witnesses, and tendered to the registers of the counties where such lands lie, and shall be as good and valid, &c. as if they had been acknowledged or proved and registered agreeably to the directions of any act of Assembly theretofore made," and the deeds *having been registered* within two years from the passing of the act, shall be received in evidence. And a *further probate* of the deeds is not necessary, under this act, to entitle them to registration, they having been legally proved before.
3. A power of attorney executed in 1772, in Ireland, to sell lands in this State, and proved before the Mayor of the city of Carrickfergus, in 1774, and the probate certified under the seal of the Mayoralty, is not admissible in evidence; as there was no law before 1793, for the probate and registration of such powers of attorney.

And this defect is not cured by *a registration* of the power of attorney, under the private act of 1782, ch. 36, sec. 3, which directs, "that this power of attorney shall be admitted *to probate and registration* in the county of Wilkes, and be as good and valid as if the confiscation acts

had never passed"—for by this act a *future probate* as well as registration were necessary to give validity to the power of attorney.

4. There being no law before 1793, for the probate and registration of powers of attorney to sell lands, a power of attorney proved before a Judge of our Superior Courts, in 1779, and registered upon his certificate of probate, is not admissible in evidence.

The bill charged, that the Complainants were members of the *unitas fratrum* of this State, and instituted this suit on behalf of themselves and all other the mem-
(195) bers of the said *unitas fratrum*. That in the year 1754, the Earl of Granville granted two tracts of land lying in the county of Wilkes, to Henry Cossart, *in trust* for the *unitas fratrum*. That Henry Cossart died previous to the year 1776, leaving Christian Frederick Cossart, of the county of Antrim, in the kingdom of Ireland, his heir at law, upon whom the said lands descended. That Christian F. Cossart was, at the time of the descent, and still continued to be, a British subject: that since the descent, he had never come over into this State, and that by the declaration of American Independence, he had become an alien, whereby, or by virtue of the confiscation laws passed in the year 1777, and at divers times afterwards, the lands held by him in trust as aforesaid, as to the legal title thereof, were supposed to have become vested in the State of North Carolina; but Complainants were advised, that the said lands having become vested in the State by a voluntary acquisition, in default of any legal proprietor, the equitable interest in trust which the *unitas fratrum* before had therein, was in no wise impaired or injured; and that any person obtaining a grant or conveyance of the legal title from the State, for the said lands, either fraudulently, with intent to defeat the trust estate of the *unitas fratrum*, or with notice of the equitable interest which the *unitas fratrum* had in said lands, became seized of the legal estate in trust for the *unitas fratrum*.

That Christian F. Cossart, after the descent to him as aforesaid, to-wit, in November, 1772, in order that the said lands might be sold for the use and benefit of the *unitas fratrum*, and the moneys arising therefrom might be applied to their use or as they should direct, executed in due form of law, his power of attorney, whereby he empowered Frederick William Marshall to sell and dispose of said lands in his name, and also empowered him to constitute one other

attorney or attornies under him, with power to per-
(196) form all other matters and things in relation to the said lands which might be deemed requisite.

That Marshall did not sell the lands, and being called by his affairs into Europe, he, previous to his departure in July, 1774, executed his power of attorney, whereby he appointed John Michael Graff, one of the members of the *unitas fratrum*, to execute all and singular the matters and things, to the execution of which he had been appointed by divers persons in Europe therein named or described.

That pursuant to the powers contained, or supposed and intended to be contained, in the said power of attorney, Graff, in July, 1778, as attorney of Christian F. Cossart, the trustee in respect to the said lands, articled to sell and convey the said lands to Hugh Montgomery, for the sum of two thousand five hundred pounds, proclamation money, of which sum he received one thousand pounds, and thereupon, by a deed duly executed to pass the said lands, supposing Graff to have been legally empowered thereto, he bargained and sold the said lands to said Montgomery, in fee simple.

That for securing the residue of the purchase money to be paid to Graff, for the use and benefit of the *unitas fratrum*, Montgomery, by deed duly executed for that purpose, demised to Graff the said lands for and during the term of five hundred years, within a proviso therein inserted, that the same should become void on the payment of the principal money with interest, as therein stipulated.

That Graff soon afterwards died, and Traugot Bagge became his administrator in due form of law; who, well knowing that the said term had vested in Graff in trust for the *unitas fratrum*, in the month of November, in the year 1784, assigned the same in due form of law to Frederick W. Marshall, then the agent and trustee of the said *unitas fratrum*, to be possessed by them.

That Marshall had died, having before his death
(197) published in writing his last will and testament, bearing date in the month of December, in the year 1801, and thereby devised all his interest and right in and to the said lands, to the Complainant, Christian Lewis Benzien, and thereof appointed said Benzien, with Jacob Van Vleck and John Gebhard Cunow, executors, which will had been duly proved in Stokes County Court, and the Complian-

ant, Benzien, had taken upon himself the burthen of the execution thereof in North-Carolina.

That Montgomery, by deed duly executed in the year 1779, conveyed the said lands to trustees and the survivors or survivor of them; that all the trustees were dead except John Brown, who held the lands in trust for two infant children, until their arrival to age: that Montgomery also made his will, and thereby charged the proceeds of the residue of his real and personal estate with the payment of his debts, and especially with the payment of his debt to the Moravians. That the same persons named as trustees in the deed aforesaid, were appointed executors of his will, who proved the same, and undertook the execution thereof.

The bill then charged, that J. Brown, the surviving executor, delayed the payment of his debt, upon the ground that he, as surviving trustee under the deed aforesaid, could not get possession of the said lands, excepting only a small part thereof. And further charged, that William Lenoir and others, having notice of the equitable interest of the *unitas fratrum* in the said lands, and intending fraudulently to defeat that interest, had obtained from the State, grants for the said lands, under which they had entered and still kept possession thereof.

The bill then prayed, that Lenoir and the other Defendants might be decreed to convey to John Brown, the surviving trustee as aforesaid, such right and title as they had acquired to the lands under their grants, and to surrender up to him the possession of said lands; and that Brown, as surviving executor of Montgomery's will, might be

(198) decreed to pay the balance of the purchase money.

The Defendants, in their answer, pray that Complainants may be put to the proof of their title, deny notice thereof, and rely upon the statute of limitations.

This cause coming on to be heard, the complainants offered to read in evidence, 1st, the grants from Lord Granville to Henry Cossart. 2d, The power of attorney from Christian F. Cossart to Frederick W. Marshall: and 3d, The power of attorney from Marshall to Graff. This was objected to by the defendants' counsel upon the following grounds: As to the grants from Lord Granville to Cossart, they were executed in England and proved before the Lord Mayor of the city of London, and the probate certified under the seal of the Mayoralty; they were therefore duly proved agreeably to the provisions

of the act of 1715, ch. 38. But it did not appear that they had been registered within twelve months after their arrival in this country, as the said act requires. As to the Power of Attorney from Christian F. Cossart to Marshall, it was proved before the Mayor of the city of Carrickfergus in Ireland, and the probate certified under the seal of the Mayoralty. Upon this probate it was registered in the register's office for Wilkes county. But there being no public act of Assembly then in force authorising the registration of powers of attorney, executed in foreign parts, upon such a probate and certificate, it was contended that the private act of 1782, ch. 36, "to vest in Frederick William Marshall, of Salem, all the lands of the Unitas Fratrum in this State," had authorised the registration of this power of attorney upon this probate and certificate. As to the power of attorney from Marshall to Graff, it was proved before Samuel Spencer, Esq. one of the Judges of the Superior Courts, by one of the subscribing witnesses, in March 1779, and registered upon Judge Spencer's certificate—but it was alleged that there was then no act of Assembly in force authorising the Judges of the Superior Courts to take probate of such powers of attorney.

(199) This case was sent to the Superior Court upon the following questions:

1st. Whether the grants and powers of attorney aforesaid were not sufficiently authenticated to be read in evidence? and

2d. Whether, if the grants be well authenticated, the complainants may not proceed against the defendants, although the powers of attorney be defective in their authentication?

BAKER, *Judge*, delivered the opinion of the Court:

The first question which presents itself for consideration in this case is, Whether the grants from Lord Granville to Cossart have been properly proved and registered? The act of 1715, ch. 38, directs "that all deeds, &c. made in foreign parts, which shall be acknowledged or proved before the chief magistrate of any city, town or corporation, within the dominions of the King of Great Britain, and registered in the precinct where the land lieth, within one year after the arrival of such deed, shall be good and valid in law, &c." These grants, which were made in foreign parts, were proved before the Lord Mayor of London on the 4th September, 1770, and arrived in this country about the latter part of that year,

or the beginning of the year 1771, but were not registered until March, 1772, which was more than twelve months after their arrival: so that they were not registered agreeably to the provisions of that act. But the Legislature passed an act in December, 1770, ch. 7, which declares "that all deeds, &c. not already registered, acknowledged or proved, shall and may, within two years after the passing of this act, be acknowledged by the grantor, &c. or proved by one or more of the subscribing witnesses, and tendered to the registers of the counties where such lands lie, and shall be as good and valid, &c. as if they were acknowledged or proved and registered agreeably to the directions of any act of assembly heretofore made." And it appears that the grants in question
(200) were registered within two years after the passing of this act, that is, in March, 1772; and so far the act was complied with. But it is contended that they were *not proved* at any time afterwards, whereas the act requires that they shall be proved or acknowledged as well as registered within two years. We cannot consider that this was necessary after they had been legally proved before. The act intended to provide for future probate and registration, where either had been omitted to be done in due time. The probate here was in due time, and there could be no reason to require a second probate, where the grantee was not laboring under any inconvenience on that account; the defect being in the registration, and not in the probate. The registration, however, was in Rowan county, when the lands lay in Wilkes; and on that account it was not a compliance with the act. But the Legislature passed an act in 1806, ch. 13, giving a further time of twelve months for the registration of grants under such circumstances. It appears that these grants were afterwards registered in Wilkes county within the twelve months: and we think that this gives validity to them, and entitles them to be read in evidence, as if they had been registered in due time in the first instance.

The second question is, whether the power of attorney from Cossart to Marshall, has been proved in such a manner as to admit of its being read in evidence. There was no law until lately, that we know of, which allowed of the probate and registration of powers of attorney. The probate, therefore, of this before the Mayor of Carrickfergus, in Ireland, in the year 1774, and its subsequent registration in Surry county in the same year, being not warranted by law, would not

justify the Court in receiving it in evidence without further proof. But this defect the Complainants attempt to remedy by an act of Assembly passed in the year 1782, ch. 36, sec. 3, which provides that "this power of attorney shall (201) be admitted to probate and registration in the county of Wilkes, and be as good and valid in law as if the confiscation acts had never passed:" by which we conceive that a future probate as well as registration were contemplated to give validity to it: as the former proof must be considered as if there were none at all, the same not being made under any legal authority. So that one of the requisites of the act of 1782, not being performed, the power of attorney is not proved and registered in the manner required by the act, and cannot be read in evidence.

As to the power of attorney from Marshall to Graff, the only proof of it which appears, was before Judge Spencer, in the year 1779; and that not being made under the authority of any act of Assembly, the power of attorney cannot be read without other proof.

As to the question whether the Complainants cannot proceed against the Defendants, although the foregoing powers of attorney should not be authenticated by legal proof of their execution; we are of opinion that Complainants may proceed, in as much as the trust estate (if any there was) vested in the *unitas fratrum* by the deeds from Lord Granville. But as this part of the case can be examined and decided on at the hearing with more correctness, we permit the Complainants to proceed, subject to such objections at the hearing, as this part of the bill may be exposed to.

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(202)

NEIL'S EXECUTOR *v.* HOSMER'S EXECUTORS.

From Chowan.

Act of 1715, ch. 48, sec. 9, barring the claims of creditors against the estates of deceased persons.

A. demised lands to B. and B. covenanted in the indenture of demise, to pay $50 annually for the rent. The demise was made in 1790, and B. died in 1794, having had possession of the premises until his death. The demise expired in 1803, no rent having been paid. A. sued the executor of B. upon the covenant of the indenture, for the rents;

the suit was brought in 1804, and the executor pleaded the act of 1715, ch. 48, in bar. Plea sustained; for

The Defendants are not sued upon their own possession, but upon the possession of their testator, upon his pernancy of the profits of the demised premises, and not their own, and they must answer as his representatives. The act bars after seven years from the death of the testator, although great part of the rent *did not become due* until more than seven years after his death; no notice of the debt having been given to the executor within the seven years.

This was an action of covenant in which the Jury found a special verdict, setting forth, that Mary Blount, widow, being seised and possessed of an estate for life in certain lands in Pasquotank county, with Sylvester Hosmer, on the 23d day of December, in the year 1790, executed a certain indenture, whereby the said Mary "demised, leased, and to farm let to the said Sylvester, his executors, administrators and assigns, the said lands with the appurtenances, to have and to hold the said lands with the appurtenances to the said Sylvester, his executors, administrators and assigns, from the first day of January then next following, for and during the term of the natural life of the said Mary: yielding and paying the sum of fifty dollars annually; the first payment to be made on the first day of January, 1792." By virtue of this indenture, Hosmer entered and took possession of the premises, and continued in possession thereof until his death, in March, 1794. Hosmer made a will and appointed the Defendants his executors, who proved
(203) the will and undertook the execution thereof. Hosmer left sufficient assets, which came to the hands of his executors, to pay the rents reserved in the said indenture of demise, and all other just debts and demands against his estate. In the beginning of the year 1797, Mary Blount intermarried with Henry Neil, and lived with him until his death, in October, 1802, when said Henry died, leaving said Mary him surviving. Henry Neil did not at any time during his marriage with said Mary, demand or receive any part of the rent of the demised premises: that the said rent remained unpaid, and with the rents which accrued after his death, remained unpaid at the time of bringing this suit. In the year 1803, Mary Neil, the widow, made her will, appointed the Plaintiff executor thereof, and shortly afterwards died. The writ in this case, was sued out on the 22d day of September, 1804, and the Defendants pleaded "the

general issue, covenants not broken, *plene administravit*, and the act of 1715."

The case was sent to this Court for the opinion of the Judges, and was argued by *Slade* for the plaintiff, and by *Browne* for the Defendants.

On the part of the Plaintiff two questions were made. 1st. Whether the Plaintiff be entitled *to all* the rents due on the indenture. 2d Whether the Plaintiff's claim be barred by the act of 1715. As to the first, it was contended, that as Henry Neil had not reduced into his possession any part of the rents, nor even made a demand of payment, the rent survived to his wife Mary, and upon her death vested in her representative; that, therefore, if the plaintiff were entitled to any part of the rents due, he was entitled to the whole. Upon this point were cited, 1 Vern. 161—2 Vern. 190, 401, 707—1 Eq. Ab. 54, *b*—2 Atk. 720—Ambler 692—2 Ves. 676.

As to the statute of 1715, ch. 48, sec. 9, it was observed, that this case did not come within its meaning and purview.

(204) The statute declares, "that creditors of any person deceased, shall *make their claim* wifhin seven years after the death of such debtor; otherwise such creditor shall be forever barred." Does the word *claim* include in its meaning debts which do not become payable until after the expiration of the seven years, as well as debts which become payable within that period? As to the latter, their payment could be enforced by suit against the representatives of the deceased debtor; and the creditors to whom they were due, might justly be required to *make claim* within the seven years. But in what way shall a creditor *make claim* within that period, whose debt does not become due until after its expiration? It is true, he might exhibit his claim to the representatives of the debtor, but he could not enforce it: and why exhibit his claim, if he be without the ability to enforce it? It appears from the special verdict, that the defendant's testator died nine years and nine months before the lease expired, or in other words, before the last rent became due. Therefore, as to a large portion of the rent claimed by the Plaintiff, it did not become payable until long after the death of the Defendant's testator. If there be a debt to become due at some future day, or upon some contingency or possibility which may happen beyond the limit of seven years after the death of the party executing the contract on which such debt or duty is to arise, such a case

could never come within the meaning of the act, although it might seem to come within the letter of it. It has been adjudged, and generally admitted, that a legacy, or distributive share of an intestate's estate, although within the letter of the act, is not within its spirit and meaning. This shews that the act does not bar in all cases and under all circumstances. Suppose Hosmer had given to Blount his bond payable ten years after date, and had died within one year afterwards; would the act bar a recovery upon this bond? Suppose that he had given to her a single bill, payable by instalments, and died more than seven years before the last payment became due; it is a well known rule of law,
(205) that no action could be maintained on such single bill, until after the time of the last payment had elapsed: would the act of 1715 bar a recovery in such case? The covenant on which the plaintiff's action is founded, contains no penalty in case of non-payment of the rent; nor any clause of forfeiture or re-entry. It may therefore, with great propriety, be likened to the case of the single bill just mentioned.

But if the act of 1715 operated upon this case at all, it can only be on the rent which became due in the lifetime of Hosmer. For since his death, the executors are chargeable on their own possession. They are always liable upon the covenant of their testator, so long as they have assets to pay, and cannot discharge themselves by an assignment of the term in any other manner. 2 Bac. Ab ,443; 1 Mod., 185; 3 Mod., 225; 1 Levinz, 127.

BROWNE, for the Defendants.—The Defendants are not sued upon their own possession; they are sued upon the possession of their testator, and are to answer as his representatives. The act of 1715 is a complete bar. It bars after seven years from the death of the testator or intestate; not from the qualification of the executor or administrator, nor from the accrual of the cause of action. It matters not, if the bond given by the testator does not become due until more than seven years after his death; upon such bond, the executors are protected from suit by the act of 1715, which was intended to quiet executors after seven years. It does not appear from the special verdict, that any notice was given to the executors of Hosmer of this debt within seven years, and the rule applies, "*de non apparentibus et de non*

existentibus eadem est lex." As, therefore, the Defendants are not charged in this case with the pernancy of the profits of the demised premises, but are charged upon the possession of their testator only, the Plaintiff's whole claim is barred.

The cases relied upon by the Plaintiff's counsel, were (206) those in which the executors were charged upon their own possession, or upon their pernancy of the profits; and in that respect they differ from the present case.

The operation of the act of 1715, upon claims against the estates of deceased persons, has been settled by this Court, in the case of M'Lellan's administrator *v.* Hill's executor, decided at June term, 1804—Conference Rep., 479. There the testator was bound to pay a debt to the intestate at a future day, before which day both parties died, and no administration was taken on M'Clellan's estate till many years after the debt became due. The executors of Hill pleaded the act of 1715, and this Court held that the act barred the Plaintiff's claim.

BY THE COURT—The act of 1715, ch. 48, sec. 9, bars the Plaintiff's claim. The principles of this decision being stated at large in the case of M'Lellan's administrator *v.* Hill's executors, decided by this Court at June term, 1804, it is unnecessary to repeat them here. Let judgment be entered for the defendants.

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(207) HARTMAN *v.* M'ALISTER.

From Wilmington District.

A. demised a lot in Wilmington to B. for five years, and in the indenture of lease, covenants, that if B., at any time before the expiration of the lease, should be willing to purchase the lot, he would convey it to him upon payment being made to him of $700. Before the lease expired, B. elected to purchase the lot, and paid $70 of the purchase money. He failed to pay the balance before the expiration of the lease, and requested further time, which was allowed. He still failed to pay, and A. tendered to him the $70, brought an ejectment and recovered judgment. B. defended the suit, and failed to tender the balance of the money. He then filed a bill, offering to pay the balance, and prayed that A. might be decreed to receive the money, convey the lot, and be enjoined from disturbing his possession. Injunction granted, and decree made according to the prayer of the bill; for,

The day of payment not being expressly stipulated, and the contract of purchase in part performed, the Court will grant a reasonable time to B. to complete the contract; but he must pay the costs both at Law and in Equity.

HARTMAN *v.* M'ALISTER.

On the 19th March, 1799, M'Alister demised part of a lot in the town of Wilmington, to Hartman, to hold for the term of five years, at an annual rent of thirty dollars; and in the indenture of lease, covenanted and agreed with Hartman, "that if he the said Hartman, or his heirs or assigns, should at any time before the expiration, or upon the expiration of the lease, be willing to purchase the said piece of land, that he, the said M'Alister, his heirs or assigns, should and would, upon the payment of seven hundred dollars to him or them, make, convey, and execute, by proper and firm warranty deeds of conveyance, a right and absolute property in and to the land, to the said Hartman, his heirs or assigns, forever." And M'Alister further covenanted that if Hartman should not purchase the premises, then at the expiration of the lease, any houses or buildings that might be erected thereon by Hartman, should be valued by two indifferent per-
(208) sons, and the amount of the valuation paid to Hartman or his assigns, &c Hartman entered under this lease, and erected several houses: he paid the ground rent to M'Alister, and in February, 1804, paid him seventy dollars, in part of the purchase money for the premises, and took a receipt in the following words, "Wilmington, 2d. Feb. 1804—Received of Jacob Hartman seventy dollars in part payment for a lot bought of me on the south east corner of Dock and Front streets." (signed) "Ch's M'Alister." The lease expired in Dec. 1804, and M'Alister supposing that by the agreement aforesaid Hartman was bound to pay the whole of the purchase money before or at the expiration of the lease, applied to Hartman a short time after the lease expired, and insisted upon having the business respecting the lot settled. Hartman requested an indulgence of ten days for the balance of the purchase money. M'Alister granted an indulgence of twenty days; at the end of which time he wrote to Hartman that he would extend the time of payment for ten days more, but that if the money was not then paid, he would expect to receive the sum of one hundred and twenty dollars per year as rent. No answer being returned to this letter, nor any further payment being made or offered by Hartman, M'Alister tendered to him the seventy dollars which he had received as before stated, and instituted an action of ejectment against Hartman, and obtained judgment. Whereupon, Hartman filed this bill, praying that he might be permitted to complete his purchase of the premises, offering to pay the balance

of the purchase money, and that M'Alister might be decreed to convey, and be enjoined from disturbing his possession. M'Alister having filed his answer, the case was sent to this Court for the opinion of the Judges

The case was argued by *Gaston* for the Complainant, and by *Duffy* and *Williams* for the Defendant.

For the Complainant, it was insisted that he was (209) entitled to relief upon these grounds. 1st. That the indenture of lease contained no express stipulation for the payment of the money at the day on which the lease was to expire. The parties might have intended that the money should be paid at or before the day; but that intention was not expressed, and the Court will allow to Complainant, a reasonable time after the expiration of the lease to make the payment, unless he has been guilty of some iniquity, by which he has forfeited his claim to equitable relief. 2d. The covenants of the indenture were mutual and independent; a performance by Hartman was not made a condition upon which the performance by M'Alister was to depend, nor *vice versa*. M'Alister could have sued Hartman for the balance of the purchase money, and compelled him to pay it. The mutuality and independence of the covenants, furnished a good ground for the interference of a Court of Equity on behalf of the Complainant. 1 Fonb. 381. And lapse of time is not strictly regarded in that Court, it being an established rule that articles of agreement for the purchase of estates ought to be performed—1 Atk. 12. The delay in this case is not equal to that which occurred in many other cases, in which agreements had been decreed to be performed. There is no evidence that Hartman at any time evinced a disposition to abandon his contract, or was guilty of any fraud towards M'Alister. 3d. M'Alister has in part performed the contract of sale, by accepting the seventy dollars paid to him on 2d February, 1804. Where the contract has been performed in part, Equity will compel an entire performance, unless the party seeking relief has, by his neglect or fraud, forfeited his equity—Powell on Contracts, 427.

For the Defendant, it was answered, that although the indenture contained no express stipulation for the payment of the money at or before the expiration of the lease, yet it

was understood by the parties, that in the event of a
(210) purchase, the money was to be so paid, and the indenture fairly warrants this construction. This indenture is to receive the same construction in this Court, as in a Court of Law. The parties intended that Hartman should have five years in which to determine whether he would make the purchase of the premises: if he elected to purchase, the money was to be paid at the termination of his lease. Equity will not enlarge the time in favour of a party who has made default: five years is a reasonable time; he has had that; after asking time from M'Alister, and getting much more than he asked, he still delayed payment; he defended the ejectment brought against him, never tendered the purchase money, nor offered to pay it until he filed this bill. After this delay, will the Court enlarge the time? If Hartman was bound to pay the money at the expiration of the lease, and he shews no very good reason why he did not pay it, equity will not enlarge the time. 2 Ver. 136—10 Mod. 503—4 Ves. jun. 689, 671, 677—5 Ves. jun. 720.

BAKER, Judge, delivered the opinion of the Court:

The Complainant, by the agreement which he made with the Defendant, was allowed time until the expiration of his lease, to determine whether he would purchase the lot in question or not, for the sum of seven hundred dollars: and, although it is probable, that the parties intended the same should be paid at or before that time, yet as the words of the agreement do not expressly require it, and as the Complainant made a payment of seventy dollars before that time, which the Defendant received in part of the purchase money, it appears that Complainant manifested his determination to make the purchase, and the Defendant confirmed it by his receipt of the money. We therefore think, that he should be compelled to convey to the Complainant the lot in question, upon his paying to the Defendant the balance of the said seven hundred dollars, with the interest thereon:
(211) and we direct that the same be paid by the Complainant within forty days after he shall be served with a copy of the decree to this effect: and that upon the payment of the said principal and interest, the injunction shall be made perpetual; but on failure to make payment, the injunction shall be dissolved. And as the Complainant by his neglect to comply with his agreement has driven the

Defendant into Court, we think he should pay all costs both in law and equity.

HILL *v.* JONES.

From Franklin.

Complainant obtained an injunction, and died before the hearing of the cause. No administration being had on his estate, and Defendant having put in his answer, moved that it be read, and the injunction be dissolved. Motion overruled.

Hill filed a bill in the Court of Equity for Franklin County, and obtained an injunction to stay proceedings upon a judgment recovered against him by Jones, in Orange Superior Court of Law. Jones put in his answer; but before the hearing of the cause, Hill died intestate; and no administration being had on his estate, Jones's counsel moved, that his answer be read, and the injunction be dissolved. This motion was sent to this Court for the opinion of the Judges.

BY THE COURT—As the Complainant is dead and his estate is not yet represented, this cause cannot be heard for the purpose of procuring any decree upon the merits. The motion must be disallowed.

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(212) THE GOVERNOR *v.* HORTON.

From Rowan.

Debt to recover £100, the penalty imposed by the act of 1794, ch. 2, for importing a negro slave into the State. The writ called upon the Defendant to answer "James Turner, Governor, &c. of a plea that he render to him £100, &c." The declaration stated, "Benjamin Forsythe, who sues in this behalf, as well for his Excellency James Turner, now Governor of the State, &c. as for himself, complains of William Horton, &c. that he render to James Turner, now Governor &c. and the said Benjamin, who sues as aforesaid, £100, &c. Variance between writ and declaration, pleaded in abatement. Plea sustained.

This was an action of debt to recover the penalty of one hundred pounds, for bringing a negro slave into this State, contrary to the act of 1794, ch. 2. The act directs the penalty to be recovered in the name of the Governor for the

time being, and the writ called upon the Defendant to answer "James Turner, Governor, &c. of a plea that he render to him one hundred pounds, &c." The declaration did not pursue the writ, but stated, "Benjamin Forsythe, who sues in this behalf, as well for his Excellency James Turner, now Governor of the State of North Carolina, as for himself, complains of William Horton, being in custody, &c. that he render to James Turner, now Governor, and the said Benjamin, who sues as aforesaid, one hundred pounds, &c." The Defendant pleaded this variance between the writ and declaration in abatement: and the case was referred to this Court, upon the question, whether the plea should be sustained?

BY THE COURT—It is necessary that the declaration in every case should comport with the writ; for its design is to specify fully and particularly that cause of action which the writ states as the foundation of the Plaintiff's claim. So essential a variance as the record presents in this case, cannot be permitted, without introducing uncertainty (213) and confusion into legal proceedings, and without suffering any diversity, however palpable, to exist between the writ and the count. The Defendant is brought into Court to answer to one person, and he cannot when there, be liable to answer two upon the same writ. The plea must therefore be sustained.

THE STATE *v.* SMITH.

From Wilmington District.

Motion to quash an indictment. In cases of doubt, the Court will not quash an indictment. It is due to the State, and to the rights of the citizen, in such cases, to have the facts enquired into by a Jury, and if the facts charged be affirmed by their verdict, the Defendant can have the same advantage of legal points upon a motion in arrest, as upon a motion to quash. Therefore, the Court refused to quash an indictment, which charged "that the Defendant, fraudulently intending to injure A. B., unlawfully and fraudulently procured a certificate of a survey on an entry of lands in the entry-taker's office of Brunswick county, to be made by C. D. the surveyor of said county; which certificate set forth that the lands described therein had been surveyed, and that H. and G. were chain-carriers; when, in fact and in truth, the lands described in the certificate were not surveyed, and when, &c. H. and G. were not chain-carriers."

THE STATE *v.* SMITH.

This case was sent to this Court for the opinion of the Judges, upon a motion to quash the following indictment.

"STATE OF NORTH CAROLINA, } *Superior Court of Law,*
WILMINGTON DISTRICT. } *May Term*, 1806.

The Jurors for the State, upon their oaths present, that Benjamin Smith, late of the county of Brunswick, planter, fraudulently intending to deceive one Alfred Moore, on the fifth day of January, in the year of our Lord one thousand eight hundred and three, at the county aforesaid, in the district aforesaid, unlawfully and fraudulently did procure a certificate of a survey on an entry of lands in the entry-taker's office of said county, and numbered eighty-six, to be made by John Collier Baker, the surveyor of said county: which said certificate set forth and cer-
(214) tified, that the lands described in the same had been surveyed, and that John Smith and George Logan were chain-carriers: when in fact and in truth, the said lands described in said certificate, were not surveyed, and when, in fact and in truth, the said John Smith and George Logan were not chain-carriers; all which, the said Benjamin Smith then and there well knew, to the great damage of the said Alfred Moore, the evil example of all others in like cases offending, and against the peace and dignity of the State.

(Signed) HENRY SEAWELL,
Attorney General."

SEAWELL, *Attorney General.*—It is contended in this case, that the indictment is insufficient; 1st, because it does not set forth any false token by which the fraud on Moore was intended to be effected; 2d, because it does not set forth how, or in what manner Moore *could* be injured; nor 3d, how he *was* injured. In support of the first objection, 2 East Cr. Law 817, is cited. It is laid down by East generally, that obtaining the property of another by false and deceitful means, *short* of felony, constitutes an offence which is cognizable by the Criminal Law; but that these means must be such as ordinary prudence and precaution would not guard against or detect: and the instances of false dice, weights, &c. are enumerated. It requires but little consideration, to discover that the principle cited from this author has no relevancy to the present case. The present indictment does not charge the Defendant with obtaining the property of Moore; but it charges him with a misdemeanor totally different and distinct in its nature from any of the cases cited from East. It is in plain terms, for procuring a surveyor, a public officer, to make a false certificate, with intent to injure and defraud Moore. It may be safely said, that the law will never require a false token to be stated in a case, which is not susceptible of any; and this leads us to a consideration of cases of misdemeanor, founded in fraud, of this description. The cases of

Rex *v* Vaughan, 2 Burr., and Rex *v.* Johnston, 1 Show. 1, are in point, besides many others which might be adduced.

The second objection may be answered by consid-
(215) ering the third. In examining the law with regard to such misdemeanors, it will be found that the cases are divided into two classes: first, where the doing of an act *lawful* in itself, but which, on account of its consequences, and the intent with which it was done, is made a criminal offence: secondly, where an *unlawful* act is charged. In the first class, as the act itself is lawful, it must necessarily be stated what consequences resulted, and with what intent it was committed; otherwise the law would be reproached for punishing an act acknowledged to be lawful. In such case, the temporal courts will never impute to a man the doing of a *lawful* act, with an *unlawful intent*, unless the *intent* be manifested by some resulting injury; both of which must be set forth and proven. The two latter circumstances being *unlawful*, constitute the offence.

It is charged in this indictment, that the Defendant procured a public officer to make a false certificate. Was there ever a time when any false practice in a public officer was not considered a misdemeanor? Can any case be shewn, where in charging a public officer, it was held necessary to shew any thing further than a violation of his duty? That forms the essence of the indictment; and it is not necessary to show that any particular injury has resulted to the community. The case of the State *v.* Glasgow, decided in this Court at June Term, 1800, proves this position. There the Defendant was charged with improper conduct in office, in such manner as could only defraud the United States: yet the Court held, that the defendant being a public officer, and appointed for public purposes, any departure from the duties of his office was a misdemeanor, although no particular injury to the community resulted therefrom. So also in 6 East Rep. 464, *an endeavour* to provoke another to commit a misdemeanor, was held indictable: and in 2 East Rep. 5 *to solicit* a servant to steal his master's goods, although
(216) it was not averred that the goods were stolen, or laid in any other manner than merely by the term "*solicit*," was held indictable, and the prosecution sustained. So in 1 Bos. and Pull. 180, an indictment for *endeavouring* to induce a soldier to leave the King's service, was held to be sufficiently laid by the word "*endeavour*," although exceptions

were taken to the indictment, because the means used were not set forth, and the counsel in argument, assimilated it to the case of false tokens in frauds. The clear principle to be collected from these cases, is this, that they charge an *unlawful* act, which being sufficient to constitute an offence, all consequences are totally unnecessary.

It has been argued, that because the indictment lays the offence to the injury of Alfred Moore, it ought to show how he could be injured. To this it may be answered, that although all the cases of perjury or forgery are purely cases of fraud, it never was thought necessary to state such an interest in the person against whom the evil intent was aimed: nor was it ever considered that either of those cases were susceptible of any other *token* than simply the *unlawful act*. If it be necessary to state the title of the party intended to be injured, then on the trial it would be necessary to prove it; and although laid to the injury of the party, such proof has been held to be unnecessary. The plain inference then is, that in both cases, the acts being *unlawful* in themselves, required nothing further to be stated.

It is also contended, that the surveyor cannot be indicted, and therefore, the accessory cannot: that the act of 1777, ch. 1, has directed the surveyor to make actual surveys, and to do many other things in regard to his office, by *different substantive clauses and sections*, and at last added a penalty of five hundred pounds, and a forfeiture of office: and that therefore, the only punishment he is liable to, is to pay the five hundred pounds. But let us ask how is the surveyor to be deprived of his office without a conviction upon in-
(217) dictment? The Legislature have said, that besides paying the five hundred pounds, he shall lose his office: and it must be intended that he should be deprived of it by constitutional means, that is, by *indictment*. But the indictment does not charge the surveyor with not complying with the act of Assembly; it simply charges, that a surveyor, a public officer, made a false return. If he be a public officer, and did make a false return; and if a false return in a public officer be an offence, then the Defendant is guilty for causing the act to be done.

TAYLOR, *Judge*, delivered the opinion of the Court: We are not prepared to say that the offence charged in the indictment is not the subject of a criminal prosecution, or if it

be, that it is stated in the bill with such plain and manifest imperfection as to call for the extraordinary interposition of the Court. In cases of doubt, it is alike due to public justice and the rights of the citizen, that the facts shall be enquired into by a Jury; and if the charges be affirmed by their verdict, the questions of law, introduced in the present discussion, will be still open to the Defendant on a motion to arrest.

JUDGES OF THE SUPREME COURT

OF

NORTH CAROLINA,

DURING THE YEAR 1809.

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*JOHN LOUIS TAYLOR, Esquire,
JOHN HALL, Esquire,
FRANCIS LOCKE, Esquire,
SAMUEL LOWRIE, Esquire,
†LEONARD HENDERSON, Esquire,
†JOSHUA G. WRIGHT, Esquire.

HENRY SEAWELL, Esquire, Attorney General.
EDWARD JONES, Esquire, Solicitor General.

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*Judge Taylor was prevented by indisposition from attending the Supreme Court at this Term.

†The Honorable Leonard Henderson and Joshua G. Wright, Esquires, were appointed Judges of the Superior Courts of Law and Courts of Equity of this State, by the General Assembly, in December, 1808; the first to supply the vacancy occasioned by the death of the Honorable Spruce Macay; the latter *vice* the Honorable David Stone, who, at the same session of the General Assembly, was appointed Governor of this State.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JULY TERM, 1809.

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(220) MAPLES *v.* MEDLIN *et al.*

From Fayetteville District.

To make the purchaser of a legal title a trustee for the *cestui que trust*, it is not necessary that he should have notice of the *particular cestui que trust:* it is sufficient if he have notice that the person from whom he buys is but a naked trustee. He ought to inquire and search out the *cestui que trust.*

On the 4th January, 1792, Marmaduke Maples obtained a grant for the lands in dispute, and on the 10th November following, he conveyed them to Thomas Maples, the Complainant. On the 3d March, 1793, the Defendant, Jno. Ray, and one Malcolm MacNeil obtained judgments before a justice of the peace against Marmaduke Maples; but it did not appear that any execution was issued or was levied by virtue of either of these judgments, till 1795. In 1794, Joel Medlin, one of the Defendants, purchased the lands in question for seventeen pounds, and sold it to another of the Defendants, John Curry; who, on the 10th August, 1794, obtained a deed from Marmaduke and Thos. Maples jointly. Between February and May Courts, of Moore County, 1795, executions were issued on the aforesaid justice's judgments, and were levied on the said lands, as the lands of Marmaduke Maples. Upon this, Curry resold to Medlin for a valuable consideration, and received the purchase money, to-wit, forty pounds. The executions were returned to May term, 1795, and orders of sale were granted, under which the lands

were sold in August, 1795, when John Ray, one of the Defendants, became the purchaser, at the price of thirty shillings. In the fall of 1795, Medlin sold the lands to Thomas Maples, the Complainant, for thirty-five pounds or thereabouts; and Maples then rented the lands to Medlin for one year; and in the fall of 1796, Medlin paid to the Complainant, Maples, the rent for the year. In the fall of 1797, Medlin continuing in possession, refused to pay the rent to Complainant, and Complainant ordered him to quit the premises. On the 13th February, 1797, Curry, to whom the Maples' had conveyed as aforesaid, made a conveyance of the lands to the Defendant John Ray, for the consideration of fifty shillings, informing Ray, previous to the conveyance, that he had resold to Medlin; whereupon this bill was filed by Thomas Maples, to compel Ray to convey the lands to him. And the case was sent to this Court for the opinion of the Judges Some additional facts were relied upon in the argument of the cause, which are noticed in the opinion of the Court.

LOCKE, *Judge*, delivered the opinion of the Court:
(221) From the statement of facts made to this Court, it is evident the legal estate in the lands in dispute, passed from Marmaduke Maples to one of the Defendants, John Curry, and that the equitable title afterwards vested in the Complainant, Thomas Maples, under Medlin's purchase from Curry, and Complainant's purchase from Medlin; unless it should appear that the first conveyance from Marmaduke to Thomas Maples, was made with intent to defraud creditors, and therefore as to them be entirely void. It is true, that at the time this deed was executed, Marmaduke was indebted to Ray, one of the Defendants, and also to one MacNeil, for their attendance as witnesses; and it is equally true, that he was also indebted to his brother Thomas, seven pounds, which the latter paid for him as prison fees; and it is proved by witnesses present at the time, that they understood this conveyance rather in the light of a mortgage, than as a conveyance of the absolute estate; in which light we are rather inclined to view this deed; for it is ascertained that Curry paid ten pounds, part of the purchase money, to Marmaduke, and the other seven pounds to Thomas, when the latter assured Curry he had then no claims on the land. Curry, however, to be sure of his title, took a conveyance

from Marmaduke and Thomas both. Hence it plainly appears, that this deed was made upon a valuable consideration, and nothing appears to shew that it was made *mala fide.* For, Thomas having paid this money in order to release Marmaduke from jail, had a good right to secure his debt by this mortgage; and although the instrument appears, on the face of it, to convey the absolute estate, yet Thomas seems to have released all further claim to the lands, the moment his debt was paid: and however absolute it may appear, yet if intended as a mortgage, it will be so considered in Equity. We are therefore of opinion, that this conveyance was not fraudulent; and the Defendant Ray seems to have viewed it in the same light. For if fraudulent, he would have had a
(222) good title under his purchase at the sheriff's sale; yet he preferred the title which Curry had obtained from Marmaduke and Thomas Maples, to a deed from the Sheriff. Indeed, he seemed to relinquish all idea of a title under the Sheriff's sale, when, instead of getting a deed from the Sheriff without paying one cent for it, he chose to give five dollars for Curry's title, although he is expressly told by Curry that he had sold the land to Medlin, and that he was no more than a trustee for said Medlin.

We are not to consider, whether Ray having notice at the time of his purchase from Curry, makes him a trustee for Complainant, and in equity bound to convey. As to this point, it may be necessary to advert to some of the facts proved in the case. It is admitted by Ray, in his answer, that Curry told him he had sold to Medlin, and had only the naked title at Law; but he says that he applied to Medlin, and he consented that Curry should convey; and it is also denied, in the answer, that he had any knowledge that Complainant had ever purchased of Medlin, or had any claim to the land. It is denied, in the answer of Medlin, that he ever resold the lands to Complainant, and admitted that he consented Curry should convey to Ray. On the part of the Complainant, the repurchase of this land from Medlin is satisfactorily proven. But it is contended, that although the land was resold by Medlin to the Complainant, yet Ray, having no notice of this contract, and having obtained the consent of the only *cestui que trust* within his knowledge, cannot be affected by Complainant's equitable title, and therefore not bound to convey. To this we answer, that this argument is not founded on the proofs in the cause; because these facts

are only stated in the answers of Ray and Medlin, to which there is a replication on the part of the Complainant, and consequently the Defendant Ray is bound to prove them. But in this proof he has failed. If, however, Ray was not held to this proof, what credit does the answer of Medlin seem entitled to, when he states, that he was to give
(223) Curry forty pounds for the land, and which he must have paid; yet he is willing to let Ray have it without having any thing repaid to him? His answer is expressly contradicted by several witnesses, as to the resale to Complainant. This part of the case, then, being stripped of the evidence arising from the answers of Ray and Medlin, stands thus: Ray, at the time of his purchase from Curry, was expressly told by the latter, that he had sold the lands, and was a mere naked trustee; in truth, that he had nothing to sell or transfer, but the mere legal title, which Ray, under this notice, obtained from him. Upon this statement, there can be no doubt but that Ray became a trustee for the Complainant, and bound to convey to the *cestui que trust*, in the same manner Curry would have been bound. But it is said that Ray had no notice of the particular *cestui que trust*, and that general notice is not sufficient. We think it is not necessary that he should have notice of the particular *cestui que trust:* it is sufficient, if he have notice that the person from whom he buys is but a mere trustee. For he is then informed, that he can buy nothing, that the seller has nothing to part with, and that the moment he obtains the legal estate, he becomes a trustee for the *cestui que trust*, be he who he may. It is his business to enquire and search him out. As between the Complainant and one of the Defendants, this is then only the common bill for a specific performance of a contract, upon a consideration actually paid. It is one of the most ordinary subjects of relief: and the Defendant Ray being a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person whom he represents would have been bound to do by the decree. 5 Bac. 393—2 Ves. jun. 440. Let the decree be entered for the Complainant, compelling the Defendant Ray to convey the lands, and to pay costs.

(224) LEDBETTER *v.* LOFTON, Administrator of DUNN.

From Rowan.

Proceedings to repeal letters of administration, must be commenced in the Court in which the letters were granted. The Superior Courts can exercise only appellate jurisdiction in such cases.

Letters of administration on the estate of Allen Dunn, deceased, were granted to Lofton by the County Court of Montgomery; and shortly afterwards, he instituted an action of detinue in Salisbury Superior Court, against Ledbetter, for certain negro slaves which were of the estate of the said Allen Dunn. Pending the suit, Ledbetter filed an affidavit, stating certain facts upon which he prayed that the letters of administration granted to Lofton, might be repealed, and that for this purpose a writ of certiorari might be awarded, to have the record of granting administration to Lofton certified to Salisbury Superior Court. A writ of certiorari was awarded, and the record certified. Sundry affidavits were taken, and the case coming on to be heard, it was moved by Defendant's counsel, that the certiorari be dismissed, on the ground that proceedings to repeal letters of administration ought to be commenced in the County Court which granted them: that the Superior Court could only exercise an appellate jurisdiction in such cases, or in consequence of its extraordinary and superintending power over inferior Courts, award a writ of certiorari to revise their judgments, where they had been refused a right to which a party was entitled, or some error or wrong had been committed, and the party affected thereby shewed some good reason why he did not bring up the case by appeal. That in the present case, Ledbetter had not applied to the County Court to repeal the letters of administration, nor in his affidavit stated any facts to call forth the exercise of the extraordinary powers of the Superior Court in awarding a certiorari. The motion to dismiss the
(225) certiorari was sent to this Court for the opinion of the Judges.

BY THE COURT—Proceedings to repeal letters of administration ought to be commenced in the Court in which they were granted. This certiorari must therefore be dismissed.

BRANTON *v.* DIXON.

From Fayetteville District.

Complainant having neglected to plead Usury to an action at Law upon his contract, and having in his bill, shewn to the Court no reason for this neglect, and not having waived the penalty given by the statute for usury, a demurrer to his bill was sustained, and the bill dismissed.

The bill charged that Branton and Shepperd gave their joint obligation to Dixon, and thereby bound themselves to deliver to Dixon forty barrels of merchantable pork: that failing to deliver the pork by the day mentioned in their obligation, Dixon pressed them for payment, and to procure a forbearance for eight or nine months, they agreed to deliver to Dixon, twenty additional barrels of merchantable pork, and thereupon their first obligation was surrendered up, and they executed another, binding themselves to deliver to Dixon sixty barrels of merchantable pork. That within the time allowed for the delivery, Branton delivered thirty-one barrels of pork; that Dixon afterwards instituted a suit against Branton and Shepperd, in Newbern Superior Court, and recovered a judgment for £282 1 6, and cost of suit, a sum too great, although nothing had been paid on the usurious contract. The bill then prayed for an injunction, and that Dixon might be compelled to come to a true and just account with Complainant, &c.

The bill set forth no reason why Complainant did
(226) not set up the usurious contract upon the trial at Law; nor did Complainant, in his bill, waive the penalty given by the act of 1741, ch. 11. for the offence of usury.

The Defendant demurred as to so much of the bill as charged him with usury, and answered as to the residue; and for cause of demurrer, the Defendant shewed, that Complainant ought to have pleaded the usurious contract, (if any,) to the action of Law. The bill, answer, and demurrer, were sent to this Court, for the opinion of the Judges.

HALL, Judge, delivered the opinion of the Court:

The bill sets forth that an usurious contract had been entered into between Complainant and Defendant, on which Defendant brought an action at Law, and obtained judgment. If the contract were really usurious, and the Complainant wished to avail himself of the statute against usury, he ought to have pleaded it to the action at Law, or offered to this

Court sufficient reasons for not pleading it. Upon this ground, therefore, the demurrer ought to be sustained. But if the Complainant had in other respects made out such a case as would entitle him to relief in Equity, he has omitted to waive the penalty which the act of 1741, ch. 11, imposed upon Defendant, in case the contract should be found to be usurious. Let the demurrer be sustained, and the bill be dismissed with costs.

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(227) BRAY'S ORPHANS *v.* BRUMSEY, former Guardian.

From Currituck.

The choosing of a guardian by orphans in Court, does not necessarily destroy the authority of a former guardian. The Court can at any time remove a guardian upon proper cause shewn, and in the appointment of a successor have entire discretion.

Brumsey was appointed guardian to the Plaintiffs by the County Court of Currituck. Some time afterwards, the Plaintiffs moved the Court for leave to choose another guardian, which was granted, and Wallis Bray being chosen by them, he was appointed by the Court, and entered into bond with security. Brumsey being dissatisfied with the judgment of the Court, appealed; and the case was sent to this Court upon the question, whether the choice made by the Plaintiffs of another guardian, superseded the appointment of Brumsey?

BY THE COURT—The choice of a guardian by orphans in Court, does not necessarily destroy the authority of the first guardian, especially without notice, and some evidence of his abusing the trust reposed in him. But the County Court may at any time remove a guardian, on proper cause appearing; and in the choice of a successor have entire discretion.

(228) MILLER AND ROBERTS *v.* LUCAS.

From Randolph.

The words in a deed of trust, "to pay, satisfy and detain to themselves the sum of £500, together with all costs which shall arise against them for their being security for A, for several different sums of money, also being common and special bail in several suits," do not extend to securityships entered into subsequent to the execution of the deed: and parol evidence is not admissible to prove that the parties intended the deed to extend to subsequent securityships.

This was an action of detinue for certain negro slaves in the possession of Defendant, to which the Plaintiffs claimed title under a deed of trust, executed to them by William Roberts, on the 27th day of May, in the year 1769, to indemnify them as to sundry debts for which they were bound as his securities. The principal question in the case arose upon the construction of this deed; whether it extended to future securityships, or was confined to securityships existing at the time of its execution. For on the 10th day of September, 1772, William Roberts, with the Plaintiffs as his securities, executed a bond to William Cunningham & Co. in the penal sum of three hundred pounds, Virginia currency, conditioned for the payment of one hundred and fifty pounds, like money, on or before the first day of March, 1773. William Cunningham being a British merchant, and the late revolutionary war coming on shortly after the bond became payable, the debt remained unpaid until the year 1803, when suit was instituted on the bond against Miller, one of the Plaintiffs, in the Circuit Court of the United States for the District of North Carolina, and judgment obtained at December term, 1803. Miller discharged the judgment, and sought to indemnify himself out of the property conveyed to him and Samuel Roberts, by the deed of trust aforesaid;

(229) Lucas, the Defendant, being in possession of two negroes, the increase of one of them named in the deed. This suit was brought to recover possession of them.

The deed set forth, "that William Roberts had bargained, sold, &c. to Haaman Miller and Samuel Roberts, their heirs and assigns forever, two slaves, to wit: Peter, &c. together with all the stock of horses, cattle, hogs, household goods, and all other estate whatsoever to the said William Roberts belonging; to have and to hold the said slaves, &c. upon special trust and confidence, and to the uses, intents and pur-

poses following, that is to say: that the said Haaman Miller and Samuel Roberts shall, at any time, and at all times hereafter, possess and seise themselves of the aforesaid slaves, and other estate before mentioned, and sell and dispose of them for ready money, for the best price or prices that can or may be got for the same, or any or every part thereof; and out of the money arising from such sale, pay, satisfy, and detain to themselves, the sum of five hundred pounds, current money of Virginia, together with all costs that shall hereafter arise against the said Haaman Miller and Samuel Roberts, on account of their being security for the aforesaid William Roberts for several different sums of money, as also being common bail and special bail in several suits in the County Court and General Court against said William Roberts, until receipts of the money paid; and also to reimburse themselves all reasonable expences in recording the present deed, or making the sale as aforesaid." It was contended on behalf of the Defendant, that the debt to Cunningham & Co. being contracted several years subsequent to the execution of this deed, was not embraced by it; and the payment of this debt by Miller gave him no right to sue for and recover the property conveyed to him and Samuel Roberts by the deed.

The Plaintiffs offered in evidence the deposition of Francis Arnold, to prove that it was the intention of the parties, at the time the deed was executed, that it should (230) extend to securityships thereafter to be entered into, and that they had so construed it after its execution.

The case was sent to this Court upon the questions, 1st, Whether the deed is to be construed to extend to securityships entered into by the Plaintiffs in the year 1772, after the making of said deed? 2dly, If not, can it be so extended by the deposition of Francis Arnold?

LOWRIE, Judge, delivered the opinion of the Court:

The construction of a deed must be made from the face of it, and no averment or parol evidence can be received to contradict it. When it is proved in a court of Justice, it is conclusive on the rights of the parties. Although parol evidence may be admitted to explain latent ambiguities in a deed, and in some special cases has been received to explain ambiguities which were patent, yet such evidence is admissible only in cases of evident necessity. The Court will never receive parol evidence to explain away or contra-

dict an explicit agreement in writing. The deed in question does not require the aid of parol evidence to understand it. The words are, "on account of their being security for, &c." The Plaintiffs contend, that these words may well be construed to extend to cases where they became securities for William Roberts, subsequent to the date of the deed, and that this construction is supported by the words "detain to themselves the sum of five hundred pounds, Virginia money, together with all costs that shall hereafter arise." The several sums for which the Plaintiffs became security were known; as well the bonds on which William Roberts had not been sued, as those on which he had been sued, and in which suits they had become his common and special bail. The whole of those sums being known, a sum certain could be easily fixed on which would be sufficient for their indemnification, and the sum of five hundred pounds was agreed on as sufficient for that purpose: but not with respect to the costs that might afterwards accrue. Hence as to
(231) the costs, the words are in the future time, and no specific sum is mentioned or agreed on. The participle "being" is used in expressing that they had become common and special bail in suits in the County and General Courts; and it is not pretended that they are, or would be entitled to indemnification for becoming common or special bail for William Roberts, subsequent to the execution of the deed. When the deed speaks of the expenses of "recording, &c. and of selling the property," the expressions used, prove clearly, that the parties were not deficient in language to convey their ideas; that they were capable of using apt and proper words to embrace all the objects which they had in view. The Court is therefore of opinion that the deed cannot be construed to extend to securityships entered into subsequent to its execution, and that the deposition of Francis Arnold cannot be received to aid its construction.

GRANT, an Orphan, by his Guardian, *v.* WHITAKER.

From Halifax.

The County Court is not bound to confirm the choice of a guardian made by an infant of fourteen years of age and upwards. Under the act of 1762, ch. 5, the Court may exercise a discretion in appointing a guardian, independent of any choice which the infant may make.

Whitaker was appointed guardian to the Plaintiff, by the County Court of Halifax; and afterwards the Plaintiff being of the age of seventeen years, came into Court and made choice of Thomas Bustin as his guardian. And it was referred to this Court, whether an infant of the age of fourteen years and upwards, may not choose a guardian; and whether the County Court is bound to confirm such choice, or
(232) exercise a discretion independent of any choice which such infant may make.

HALL, *Judge*, delivered the opinion of the Court:

It has been already decided in this Court, that however much a Court may be disposed to accommodate the feelings of an infant of fourteen years of age or upwards, in the appointment of a guardian, they are not bound absolutely by the choice of the infant; and that decision well accords with the true spirit of the act passed in the year 1762, ch. 5, as well as with the opinion of the Court in the case of Mills *v.* M'Alister, 1 Hay. Rep. 303. It would be much to be regretted, if a Court were bound by the choice of an infant in a case of so much importance as that of appointing a guardian. That choice might be brought about by artful, designing persons, whose sole aim would be their own interest. The infant, owing to his tender years and inexperience, could not guard against these artifices, which a Court would be competent both to see and prevent. We are therefore of opinion, that the Court are not bound to confirm the choice of the infant, but are at liberty to exercise a discretion, independent of any choice which the infant may make.

(233)

HILL, Administrator, &c. *v.* MOORE AND WATTERS, Executors of CLARKE.

From Wilmington District.

A posthumous child is entitled to a distributive share under the statute of distributions.

James Moore died intestate in the year 1783, leaving a sister named Sarah, and two brothers named Alfred and Julius Cæsar; he left his wife Elizabeth *ensient* with a daughter, who was born several months after his death. She was named Mary Paris, and died in September, 1784, without brothers or sisters. Elizabeth, her mother, having obtained administration of her estate, intermarried with William H. Hill, and died in the year 1788. Administration on her estate was granted to her surviving husband, William H. Hill.

After the death of James Moore in 1783, but before the birth of Mary Paris, Julius Cæsar Moore died intestate and without issue, possessed of a large personal estate. Sarah, the sister of Julius and Alfred Moore, intermarried with Gen. Thomas Clarke, who died in the year 1791, having made a will and appointed Henry Watters executor thereof.

In 1785, Alfred Moore and Thomas Clarke claiming one moiety of the share to which Mary Paris was entitled of her father James Moore's estate, the said share was divided between Elizabeth her mother, the administratrix of her estate, and the said Alfred Moore and Thomas Clarke.

The estate of Julius Cæsar Moore was taken possession of by Alfred Moore and Thomas Clarke, and one-sixth part thereof allotted to Elizabeth, administratrix of the estate of Mary Paris Moore.

This bill was brought by William H. Hill, as administrator of the estate of his deceased wife Elizabeth, against Alfred Moore, and also against Henry Watters, executor of the last will of Thomas Clarke, deceased, praying, first, that (234) the division of the estate of James Moore, deceased, which had been made in 1785, might be set aside, and the share thereof delivered over to Alfred Moore and Thomas Clarke, be decreed to be returned, &c. upon the ground, that upon the death of James Moore, one-third part of his personal estate belonged to his wife Elizabeth, and upon the birth of his daughter, Mary Paris, the other two-thirds belonged to her: that upon the death of Mary Paris,

her two-thirds vested in her mother Elizabeth, so that Alfred Moore and Thomas Clarke had no right to any part thereof. Secondly, that an account might be taken of the estate of Julius Cæsar Moore, deceased, and one-third part thereof be decreed to be paid to the Complainant, on the ground, that although Mary Paris was in *ventre sa mere* at the time of her uncle Julius' death, she was entitled to a distributive share of his estate, which upon her death vested in her mother Elizabeth.

The Defendants demurred to so much of the bill as sought to have an account and division of the estate of Julius Moore, deceased, and answered to the other parts of the bill. The question arising upon the demurrer was, "Whether, Mary Paris Moore, being an infant in *ventre sa mere* at the death of Julius Cæsar Moore, she was entitled to a distributive share of his estate." This question was sent to this Court, and was argued by *Alfred Moore*, one of the Defendants, in support of the demurrer, and by *Gaston* against it.

ALFRED MOORE, in support of the demurrer. The question for the determination of the Court upon the Defendant's demurrer, is this: Can an infant in *ventre sa mere*, take under our statutes of distributions, equally with a brother and sister of the deceased, who were living at the time of the brother's death, and capable of taking? If it shall be the opinion of the Court, that such an infant can take, then the demurrer will be overruled; but if on the contrary, the surviv-
(235) ing brother and sister were entitled to take exclusively, then the demurrer must be allowed, and the Defendant dismissed as to so much of the Plaintiff's bill as has been demurred to.

It will be observed, that the claim made under the infant in the present case, is by representation; for it was neither a brother nor sister:—it was a niece.

The Complainant can have no right except under the law of North Carolina; and the sole question will be, whether this unborn infant could, under the law of North Carolina, be capable of taking its uncle's estate, by representing its father? The act of 1778 informs us, that the Common Law, the statute laws of England in force and use in this country, and our own acts of Assembly, passed previous to the declaration of independence, and not inconsistent with our form

of government, constitute the law of this State. The acts passed since 1778 are also a part of our law.

It will be observed, that in no act of the British Parliament in force in this State, or in any act of our own Legislature, is there a single word to be found about an infant in *ventre sa mere:* we must therefore turn to the Common Law, and see whether a claim under such an infant can be supported.

By the Common Law, an infant in *ventre sa mere* was not considered as in *rerum natura*—Plowden 366. It was, indeed, regarded in some cases to avoid wrong and inconvenience, as other fictions are intended; as where one had given warranty, and died without *other heir*, this infant shall be vouched—Hobart 338—Co. Lit. 390, a. § 744. But in Co. Lit. 100, b. it will be seen, if his sister be forejudged, *he is bound*, because *he had no right*. Such infant was only regarded to avoid wrong and inconvenience in cases of *descent*, for where he was to take by purchase, as in the present case, *he was not regarded at all*—1 Co. 95, a.—3 Co. 61, b.—1 Shep. Ab't. 143—Dyer 303-4—2 Bl. Com. 169. This, therefore, is conclusive with respect to *personal property* which cannot descend—2 Vern. 710—2 Brown, 47, 63. To kill such an in-
(236) fant, however maliciously, as by giving poisonous drugs to the mother for that express purpose, is not felony—3 Institutes, 50. And why is it not felony? Why truly for the reason first given, that it is not considered as in *rerum natura;* for if it was so considered, it is undoubtedly murder by the same law. Further, if a man had made his will, and devised or bequeathed property, real or personal, with a plain intent, that the interest should vest *at the time of his own death*, an unborn infant was utterly incapable of taking, although it had been his own child—3 Dyer, 303. There is no part of the English law more plain than this—there is not a dissenting voice among Judges or Lawyers respecting it, and this is grounded upon the reason first given, that such an infant is not in *rerum natura;* for if the devise or bequest had been, that the infant should take *when it should be born*, then the devise or bequest is good, which may be fully seen in Fearne upon Devises.

It will be observed, therefore, that although it is not unlawful to make provision for such a child, when it shall come into life, a devise of a present interest to such infant is absolutely void, because you cannot give to a *non-entity*. It should be fur er observed, that if a present interest given to such

infant, is good at one period, it is good at another. In the early growth of a fœtus, it is believed not to have life; some months pass away, before it is supposed to be alive: in this unanimated state, it would surely be absurd to suppose it could take anything. Let us therefore suppose, that property is given to it at an after period to this first stage, say four months before its birth, and that the child is born dead, can it then be said that this gift vested anything in the infant? For if it did, let us look at the consequences. Should this infant, at this period of four months before its birth, have in existence a brother or sister capable of taking, but immediately before the birth, such brother or sister should die, and then the infant in *ventre* should be born dead; will any man pretend that the property thus given to this
(237) unborn infant, vested in the brother or sister, so that their representatives are capable of taking? To shew the absurdity of this, let us further suppose that the child had died in its mother's womb several weeks before its birth:—who is to ascertain the precise moment when it did die, so that legal consequences should result from it? Suppose the child is never born at all, but is taken from the mother piece by piece, as did actually happen to a woman in the neighborhood of Wilmington, where the flesh dissolved of itself and passed away, and the bones worked through the belly of the mother. Did it ever enter into the head of any man, that administration could be granted upon the goods of such an infant? Yet there is no written law forbidding it; the whole arises from the principle first laid down, that it is considered as not in *rerum natura*. For if it was considered as in existence, so as to be capable of taking property, there is neither law nor reason, why the same consequences respecting property should not follow in this case, as well as any other. What impropriety could there be in a brother or sister taking under such circumstances? It is therefore apparent, that the Plaintiff has no claim under the Common Law, and there is no statute law of England in force in this country, or act of our own Legislature, that can aid him in this particular.

We will next shew that a distributive share vests immediately upon the death of the intestate, as effectually as in the case of a devise to take effect immediately upon the testator's death—1 Vern. 403—3d Mod. 58.

The only support which the Plaintiff has for his claim, is

the *civil law;* for although the counsel who argued the case, did not venture openly to put it upon that footing, yet they took a course which, if successful, would produce the same effect. They contended, that our act of distributions was a copy of the British act, and ought therefore to receive a construction conformably to the British act; and that it
(238) really was the intention of the Legislature to have it thus expounded.

It must be obvious to every one, that there is no expression in our act, that either requires or can warrant such a construction. It will be remarked, that the English statute of distributions to which we refer, was passed in the 22d and 23d of Charles the 2d, and that by our act of 1778, no acts of the British Parliament which were not in force and use in this state at the time of our independence, are received as the law of North Carolina. It has been pertinaciously adhered to by all our Judges, and the best informed Lawyers, that no act of the British Parliament, passed subsequent to the granting of our charter, which was in the 16th of Charles the 2d, was in force in this State. Some acts of the British Parliament, it is true, passed long after the granting of our charter, have been in use; but this arose from the power of the British government over us, and not its right; and although these acts have been submitted to, they have always been complained of. It will be further observed, that these acts which have been submitted to from necessity, and on account of the structure of the Courts, during the royal government, have always *had a clause expressly enforcing them in the colonies;* which the British statutes of distributions certainly have not, and they have constantly been considered as neither in force nor use among us; for if this was not the case, what occasion had our Legislature to pass a statute of distributions, which, as our adversaries contend, is in the very words of the British statute. From these circumstances, then, this must at least appear, that our adversaries contend for a construction of our act conformably to that upon a British act, which *was never any part of our law.*

But there has been introduced upon this occasion, adjudications of the English Judges upon their statutes of distributions; and as it is notorious, that the civil law has always

been rejected in England,* 1 Bl. Com. 14, it may
(239) therefore be supposed, that when we find the English Judges deciding that an unborn infant is entitled to take, our Judges ought to decide in the same manner. Here we make this objection—our Judges must decide all cases that come before them, *according to the law of our own country.* If, therefore, it should appear, that the adjudications of the English Judges are not sanctioned by the Common Law, the acts of Parliament in force in this State, and the acts of our own Legislature, such adjudications can by no means be regarded by our Judges; for if they should be governed by such adjudications or decrees of the English Judges, it can only be upon belief, that the opinions of English Judges are equal to acts of our Legislature. We can make it appear that the English Judges have decided rightly upon the authority of their *own act;* but when our adversaries assert, that our act is a copy of the British act, and should therefore receive the same construction, they are guilty of a great error. Our act of distributions does indeed copy the British act in every particular *except the very one on which the British Judges were enabled to let in a posthumous child; and which all the hopes of the Plaintiff are placed.* For it will be observed by the Court, that it is enacted in the third section of the act of 22 and 23 C. 2, that distributions shall be made of intestates' estates, *according to his majesty's ecclesiastical laws.* Now in our act of distributions, the 2d clause which is directly above, and the 5th clause which is directly below (for the 4th clause is only to save the customs of York and London) are *copied*, but the 3d section *is carefully left out.*

All writers upon the Law will inform us, that in
(240) construing statutes, we are to look at the mischief intended to be remedied, and then at the remedy provided against the mischief. Let us, then, see what was the evil existing at the time of the passing of this act of 22d and 23d C. 2d, and see the remedy provided against it, and how far our statute of distributions conforms to the British statute.

* We are not to understand from this that *no part* of the civil law is in force in England; for although the body of the civil law has been always rejected, nevertheless parts of it have been adopted, *vide* 1 Bl. Com. 14. But for this, the English Judges could not have construed their acts of distributions, so as to let in a posthumous child, as will be seen.

It is known to the Court, that the Ecclesiastical Courts of England, have, from the time of their erection to the present day, had in the first instance the management of the personal estates of all intestate persons. These Courts are governed by two codes of laws—the one for the government of all clerical matters, called the Canon; and the other for a distribution of justice in all cases respecting property which were cognizable in them—which is the Civil Law. The great abuse which the ecclesiastics made of their power, by taking the whole of the dead man's estate to themselves in *pios usus;* or by dividing it between the widow and children, in an arbitrary, and frequently capricious and unjust manner, in violation even of their own rules of distribution, was for centuries, a source of complaint in England. The remedy for the evils complained of, progressed slowly. By Statute Westminster the 2, 13, Edw. 1, c. 19, the ordinary was compelled to pay the debts of the deceased as far as the goods would go. Statute 31, Edw. 3, c. 11, took the management of intestates' estates out of the hands of the ordinary, and compelled him to grant *administration* to the next of kin to the deceased. It will here be proper to observe, that until this time, there was no such thing as an administration in England—to the Common Law such a term was utterly unknown; for by that law, upon the death of a man, anybody might take possession of his personal estate, and whoever did so, had the sole management of it; and such person was styled *executor*. 1 Nels. Abt. 143, 5th Repts. 82.

(241) It will easily be perceived therefore, how the Priests who were better served than any other people, and had their emissaries all over the kingdom, came to be the sole managers of intestates' estates. Statute 21, H. 8. allowed the ordinary to grant administration to the widow, next of kin, or both at option.

Now, after the passing of these three statutes, all the relief gained, was that of compelling the ordinary to pay the debts of the deceased; for the *residuum*, after taking out the *partes rationabiles*, remained in their hands, or in those of the administrator they had appointed, from whom they always took bond, to distribute according to *their directions*. This *residuum* might as well consist of the whole as a part of the estate; for by the Common Law, which before the passing of the Statute of 22 and 23 C. 2, guided the course of distributions, if a man died intestate, one-third of his estate went to

his widow, one-third to his children, and the remaining third to the *King;* if he died without a wife, then one-half went to his children, and the other to the King; if without wife or child, then the whole went to the King, for a brother or other collateral could in no event take. 2 *Bl. Com.* 491, 492, 494. But at a very early period this branch of the royal prerogative, was granted by the King to the prelates in *pios usus* for the benefit of the dead man's soul. To remedy the hardships resulting from the course of distribution at Common Law, and the still greater hardships resulting from the grasping avidity of the clergy, the statute of 22 and 23 Charles 2, was passed; which after dividing the dead man's estate between the widow and children, and letting in the brothers and sisters, and their representatives or next of kin, in default of children, enacts in the 3d section, "*to divide and settle,* and to compel such administrator *to observe and pay the same,* by the *course of his majesty's ecclesiastical laws.*" Here it appears that provision is made in this 3d section, for the case of an unborn infant; because by the ecclesiastical law, an unborn infant is considered in *existence,* and (242) is equally entitled to take, with a child actually born; which is directly contrary to the Common Law, as has been shewn. Had it not been for this section, such unborn infant would have been left in England as it is here, to the operation of the Common Law. It will clearly appear therefore, that when it is asserted, that our statute is a *copy* of the British statute, the assertion is incorrect, because the only part of the British statute, which can authorise a Judge to decide upon the Civil Law, in favour of an infant in *ventre,* has been left out in our act, and under *remarkable circumstances,* for we have copied from the British statute, directly *above* and directly *below.* The insertion of what is contained in the 3d section of the British act, into that act, is a plain proof that it was perceived by the British parliament, as it is perceived by us, that without that section, an unborn infant could not take; because if it could, there was no reason for introducing the Ecclesiastical Law, which could only operate upon that single point, for in every other particular, the statute was in itself full, clear, and complete. However proper therefore it might appear to construe our statute of distributions, as the English Judges construe theirs, in those parts where they precisely agree, what reason can there be for saying, that we are to construe our statute upon a section

of the British statute, which has been *excluded from ours*, and upon which alone the Plaintiff's claim depends? This exclusion has the very same effect with a direct negative; it is equivalent to a dictate of our Legislature to us, that all the other parts of the British statute should be regarded, but this should not; for they have taken in the one and left out the other. If this conduct has been unwise, it is for the Legislature alone to alter it; but the Defendant will venture to offer a conjecture, that whenever they come to legislate upon it, they will not adopt what is *now contended for*, under the 3d section of the act of Charles 2d. It would be
(243) very easy to show, if it was necessary to trouble the Court with an analogy to other acts of Assembly, that the Legislature has always had a leaning to that branch of the family from whom the property was acquired, which is our case, for the Defendant retains nothing but his father's property, in opposition to a man who is a stranger in blood, and claims under a woman who was also a stranger in blood to his father.

Among the cases which have been introduced by the Plaintiff's counsel, there is but one, the case of Wallis and Hodson, 2 *Atk.* 115, which can be said to bear upon the present question, and this merely because it was a question respecting a *collateral*. The Defendant, therefore, passing the other cases by, will proceed to examine this, as it is the one most relied upon; and from this he will plainly make it appear the Plaintiff receives no support.

The principal reasons which governed Lord Hardwicke in the case of Wallis and Hodson, as he himself declares, were, that the Plaintiff was in *rerum natura*, and that by the rules of the Common and Civil Law she was as much a child, as if born in the father's lifetime: and to shew that she would so have been considered at Common Law, he cites the case of an infant in *ventre* being vouched in a common recovery. But it will here be observed, that this argument is forced, because such infant connot be vouched alone, the *heir at law in being must be joined with him—Co. Lit.* 390, *a.* § 744. It is a mere fiction to avoid wrong and inconvenience—*Hobart*, 338, and is restricted entirely to *cases of descent*—1 *Co.* 95, *a.* —1 *Shep. Ab't.* 143. He further says, that a devise to such infant is good by the opinions of Treby and Powell. It was said in argument by Powell, that "a devise to an infant in *ventre sa mere*, by the *better opinions*, though various, is *not*

good—vide 11 *H.* 6—13 *Bro. Devi.* 32—1 *Rol.* 609-10—*Dyer*, 303-4, 342—*Mod.* 127, 177, 634—2 *Buls.* 272—1 *Rol.* *Repts.* 110—*Lit.* 255;" but he says he is of a different opinion in the case before him, because "it is plain testator *intended a future devise.*" His lordship says further, that an injunction may be granted in its favour to stay waste, and cites 2 *Vernon* 710, Musgrave and Parry—yet there is no such injunction in that case, and the Chancellor there decided against the infant in *ventre.* (244)

It is entirely manifest, therefore, that neither the Common Law, nor any statute in force in this country, had the least share in bearing Lord Hardwicke out in his decree. But the sanction for the decree of Lord Hardwicke is found in the 3d section of the act of Charles 2d, and there also is the sanction for the dictums or decrees of the Lord Keeper North, and Lord Raymond; and the Defendant here defines the most laborious and best informed Lawyers, to produce a single case adjudged in a Common Law Court *prior* to the passing of the act of 22d and 23d Charles 2d, where an infant in *ventre* was held capable of taking a *present* interest. If the decree of Lord Hardwicke is not to be justified upon this section of the act of Charles 2d, then it is without any justification at all, and so would incontestibly appear, from the examination that has been given it. After the most attentive examination, then, of the case of Wallis and Hodson, this is the result. If Lord Hardwicke decided properly, it was in consequence of the 3d section of the act of Charles 2d, enforcing the ecclesiastical law; which is of no more force in this country than the Persian or Hindoo law—if his decree was not grounded upon this, then it was an illegal decree; and certainly, therefore, in either case can have no force as a *precedent.*

Whether sound policy would justify the Court in deciding against the Defendant, supposing they had a right to exercise their opinions respecting policy, is worth some attention. Upon the death of the father, the mother, it is said, is to take the whole, in case of the death of the child. Now, by the Common Law, the next heir to an infant could never be its guardian; and why?—"because he is interested to destroy his ward." Is not a mother interested to do the like? Suppose the case of a deformed and sickly wretch of a child, a large estate, the mother young and under strong temptations in the prospects of a second (245)

marriage—how easily may a sucking child be destroyed without detection; who is there to guard this infant by day and night, no brother or sister to share the property? But the case is yet worse; suppose her married, and the husband more anxious to get the estate, than to preserve the life of the child—what then?

It is confidently believed, that should the question of Law be in favor of the Defendant, it could not be otherwise than gratifying to the Judges to decide in his favor, from the peculiar complexion of the case. But other cases may arise, depending upon the same principle of Law, under such circumstances of hardship, as could not fail to move the compassion of the Judges. But this neither can nor ought to have any weight upon their minds; but if such feelings can become overruling ingredients in any case, the Defendant is surely entitled to the full benefit of them. From the earliest times, as far as we have any knowledge of the Common Law, until 10 and 11 Wm 3d, such hardships did exist in England in all their rigor, with respect to an infant in *ventre* taking a contingent remainder, and doubtless must have often and severely exercised the feelings of the English Judges; still the Law, hard as it might appear to be, was never attempted to be controlled by their feelings: the Parliament alone was resorted to for relief.

In a question of such importance as the present, nothing that can by possibility operate upon the minds of the Judges, ought to be left unexamined. It may be said, that the question has been already settled by adjudged cases in our own Courts, which ought to govern the present case. It is not known to the Defendant, that any case like his has
(246) ever been adjudged: but if there had been hundreds of them, it is contended they have no authoritative power to bind the judges in this case. There is a plain difficulty arising from want of information respecting what *has been* adjudged; for as far as has been seen of the books of reports, it is well known to the Defendant that many of the cases reported have been entirely misconceived, being cases in which the Defendant was himself concerned when he was at the bar, or determined when he was upon the bench. If any adjudged case in this country, ought to have any validity as a precedent, it must be because it has been *rightly adjudged;* for if the contrary should prevail, it is not conceivable what sort of security there can be for property in this

State; for there are abundant cases to be found, that are directly contrary upon the same question. What, then, would be our situation? a Judge is at liberty to choose which side he pleases, and consequently to decide for or against a man, and has equal authority for it; in fact, there has never been a Court in this State, so constituted as that it might be said to be safe to take its adjudications for authority. Before the revolution, the Superior Courts were all Circuit Courts, and no man acquainted with the profession, will say, that any law question of importance can be satisfactorily and safely settled upon a circuit; the reasons are too obvious to be insisted upon. Errors notorious have been committed by the wisest Judges under such circumstances, and such have frequently been corrected; but not in this State, because the cases were taken up and settled at the same Court, amidst a multitude of other business, and no writ of error or appeal, for a revisal of such question, was practicable. There were, indeed, a few instances upon demurrers, cases agreed, and the like; but these were also settled in the midst of the same hurried scene. The same objection applies to the Courts established since the revolution, where three judges made the circuit. After a fourth Judge was added and the circuit divided, the inconsistencies in-
(247) creased, until the establishment of the Court of Conference, (now the Supreme Court, which, as could easily be shewn, is very different from a Court of errors and appeals,) before which our judiciary has never presented such an aspect as to make adjudications of any authority. Whether this last Court has or has not decided this question, is not known to the Defendant; but if it has, it can only be in a few cases, and certainly without that view of the case which it is here attempted to present. Besides, the Supreme Court is itself in too fluctuating a state to give such an important effect to its decisions; for it will be recollected, that if the argument here offered is insufficient to entitle the Defendant to prevail, the Judges now to decide have no need to rest upon adjudged cases; they must decide against him because the Law is against him. But if, upon the other hand, the argument is sufficient to shew his legal right to the property demanded of him, then what would follow?—he must still lose that legal right, because there are adjudged cases that are evidently erroneous.

To conclude—if there is such a thing as natural justice, it

is on the side of the Defendant in the present case, for he retains nothing but his father's property, against a man who is an utter stranger in blood. What the law of North Carolina is, has been clearly shewn. It has been plainly declared in the act of 1778; by that law, the Plaintiff in the present case can have no claim. It has been shewn that the Civil Law is not a part of our law, and that the Plaintiff's right is derived under that law. It has been shewn that the adjudications in England, so far as they are in support of the Plaintiff, are all bottomed upon the Civil Law—that the Judges in England have decided right, because they have been directed to decide as they have done by a clause in their act of distributions. Should the Judges in the present case decide as the English Judges have done, it must be wrong,
(248) because the section of the British act which made it lawful and proper in the English Judges to decide as they did, has been totally omitted in our statute—it is not in the competence of our Judges to supply the place of this section, because that would be to make law instead of expounding it. Until the Defendant, therefore, shall be better instructed by the fallacy of some important part of this argument being shewn, he must feel entire confidence that the Court will dismiss him as to so much of the Plaintiff's bill as has been demurred to.

GASTON, *contra*.—The demurrer presents the question, whether a posthumous child can take a distributive share. The difficulty of this question is not commensurate with its importance, whether we regard, 1st, The words of the statute of distributions; 2dly, The design of the Legislature; or 3dly, The doctrine of the law on analogous subjects.

1st. The statute of distributions passed in the year 1715, ch. 48, provides, "that the surplus (after provision for the widow,) shall be distributed by equal portions to and amongst the children of the intestate, and if there be no children, then to be distributed equally to every of the next of kin, who are in equal degree, and to those who legally represent them." On account of a verbal inaccuracy in the 6th section of this act, its provisions were re-enacted by the act of 1766, ch. 3. Some alterations as to the widow's share, were made in 1784 and 1787; but so far as respects the present controversy, the law of 1715, as explained by that of 1766, remains yet the same. Does Mary Paris Moore legally represent her father

James? This enquiry depends upon the proper construction of the word "children," used in the first part of the clause cited: this word, both in its legal and ordinary acceptation, embraces as well those born after, as before the intestate's death; and thus it must be understood, unless there
(249) be conclusive reasons for restricting its signification.

In the first place, it is said, that an infant in *ventre sa mere*, is not actually in *rerum natura;* that it is a mere non-entity, and of course cannot *then* take. Upon this point, the counsel in support of the demurrer, has shewed much curious learning and speculation, which it is not necessary to examine minutely; because it is not contended that an infant *takes* when in *ventre sa mere*, but that it shall take when it comes into being, and shall be regarded by the administrator in making distribution. To this, however, it is said, in the second place, that the right to distribution must accrue immediately upon the intestate's death, and 1 *Vern.* 403—3 *Mod.* 58, are cited to prove this position: but these cases do not establish this position; they prove merely the transmissible nature of a right of distribution. It does not follow from this circumstance, that a posthumous child cannot take a distributive share, any more than it follows from the transmissible nature of a legacy, that it cannot be given to a child in *ventre sa mere.* Decisions will be quoted in a subsequent part of the argument, to prove the correctness of this distinction.

2d. What was the design of the Legislature in passing the act of distributions? To discover this design, let us observe the rules laid down in Heydon's case—3 *Rep*, 7. What was the mischief? That the administrator had all the estate; for the bonds taken by the ordinary in England to compel distribution, were illegal—1 *Lev.* 233—2 *P. Wms.* 441—447. What the remedy? An *equal* distribution among those *equally* dear; an universal will, according to the principles of equity, and the feelings of nature. How much will this remedy be fettered—the principles of equity, and the feelings of nature outraged, by the Defendant's construction? If the makers of the statute were asked, whether they meant to add to the miseries of the *posthumous orphan*, by forbidding him any part of his parents' personal estate, what would be their answer?

The intention must be manifest, and ought to be re-
(250) garded, even though it were not well expressed by the words: how much more when perfectly consistent with them.

3d. If we look into analagous dicisions, we shall find that in all instances, both at Common Law and by Statute, (unless when it is repugnant to some inflexible and rigid principle) children in *ventre sa mere*, are considered, when they come into being, as having the same rights with those who had an actual existence. They may take by descent—*Co. Litt.* 55, *b*—3d *Wills.* 516. They may take by devise—*Powell on Devises*, 320 to 326. They may be executors or take a legacy—*Godolphin* 102. They will take benefit of a term to raise portions "*for the children of A. living at his death.*" Hale *v.* Hale—*Prec. in Ch.* 50: Beale *v.* Beale—1 *P. Wms.* 246. They will take under a bond in favour of "*such children as A. shall have living at his death.*" Gibson *v.* Gibson, 2 *Freeman* 233 They may have an injunction to stay waste—*Prec. in Ch.* 50. They come within the exceptions for the benefit of infants in the statute of limitations—1 *Plow.* 366. They are, as to all beneficial purposes, considered as in *rerum natura*—5 *Term Rep.* 49. 2 *H. Black.* 399. What possible reason can then be assigned why they should not be regarded in like manner under the act of distributions? They are so regarded in England, from which our statute is really borrowed—2 *Freem* 230—Ball *v.* Smith. This case was decided by Lord Somers, only twenty-eight years after the statute of distributions of that country was passed—2 *P Wms.* 445. Edwards *v.* Freeman: this case was decided by Lord Chief-Justice Raymond, in 1727—2 *Atk.* 115. Wallis *v.* Hudson, decided by Lord Chancellor Hardwicke, in 1740—1 *Ves.* 156.

But it is said that these decisions are founded upon the Civil Law, by which the statute of 22d and 23d Charles 2d, directs the *division* to be made. The statute contains nothing more as to directing distribution by the rules of Civil
Law, than ours. It is true that the latter part of the
(251) 3d section is not found in our act, for we had no Ecclesiastical Courts. The Civil Law was probably intended to be regarded, because by that law, testamentary matters and the estates of intestates had generally been regulated; and because the main design of the act was to authorise the ordinary to take such bonds as were before taken without authority. 2 *P. Wms.*, 447. Precisely the same

reason applies to the construction of our act. The acts of 1723, ch. 10, and of 1762, ch. 5, sec. 23, direct the mode of proceeding in conformity to that used in the Ecclesiastical Courts in England; and the case of Dickenson and Spier decided in this Court, shew that *this mode* is to be pursued in all matters of a testamentary nature.

BY THE COURT—We are of opinion, that a posthumous child is entitled under our statutes of distributions to a distributive share; and that Mary Paris Moore was entitled to a share of Julius Moore's estate equally with the brothers and sisters of said Julius, who were living at the time of his death and capable of taking.

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(252) M'CREA *v.* STARR.

From Tyrrell.

Defects in warrants must be pleaded in abatement; they cannot be taken advantage of after verdict upon motion to arrest the judgment.

After verdict, the Defendant moved to arrest the judgment, for that the warrant was not made returnable within thirty days, Sundays excepted, nor was the time or place of trial mentioned therein.

HALL, *Judge*, delivered the opinion of the Court:

When there is an appeal from the judgment of a justice of the peace to the County Court, the Defendant may plead in any way he thinks proper; he is not bound by any defence which he made before the justice, because there is no correct way of ascertaining what that defence was. But when he enters his pleas in the County Court, he is bound by them, because they become matters of record. If, therefore, upon the trial before the justice, he defends as to the merits, upon an appeal to the County Court, he may plead in abatement. But if in the County Court he plead to the merits, and neglect to plead in abatement such plea as he now tenders in the form of reasons in arrest of judgment, and there is a verdict against him, he ought to be contented; for there is no connexion between the merits of his case and such defects in the warrant as he now points out. Had he pleaded such defects in abatement, the Court would have judged of them;

but he has lost that opportunity, by pleading to the merits of his case. Let the reasons in arrest be overruled, and judgment entered for the Plaintiff.*

(253) SAWYER *v.* HAMILTON.

From Camden.

The General Assembly having authorised the County Courts of Camden and Pasquotank to appoint commissioners to lay out a road, and having authorised John Hamilton to erect toll-gates on the said road and exact toll: the commissioners laid out the road across the lands of Enoch Sawyer: and their report being returned to Court, was set aside, upon the ground that Sawyer had no notice.

The General Assembly, in the year 1805, passed an act authorising the County Courts of Camden and Pasquotank to appoint commissioners to lay out a road from Elizabeth City, in Pasquotank, to Indian Town, in Camden, on which road John Hamilton was authorised to erect toll-gates and exact toll. The commissioners appointed under this act proceeded and laid out the road, and returned their report to Camden County Court. A considerable portion of the road was laid out across the lands of Enoch Sawyer, the commissioners directing this part of the road to be opened to the width of twenty-six feet, and "that Hamilton should have the use and benefit of the timber thereon, necessary and convenient for the making and establishing said road." Upon the return of this report, a motion was made on behalf of Sawyer that it be set aside. It was contended, that the act of Assembly under which the Commissioners had laid out the road, was unconstitutional; that it provided for the establishment of a turnpike road for the exclusive benefit of an individual, without indemnifying those persons across whose lands the road was to be laid out: that it deprived one citizen of his freehold and vested it in another, at the will of the commissioners. It was further contended, that the road was laid out without notice to Sawyer, and on that account the

* Other cases were decided at this term to the same effect: In one, a motion to nonsuit the Plaintiff, because the *time and place* of trial were not set forth in the warrant, was overruled; because the act does not require them to be set forth in the warrant.

report ought to be set aside. Upon the argument of this case in Camden Superior Court, his Honor Judge Taylor, who presided, was of opinion that the report ought to be
(254) set aside, on the ground that the act of Assembly under which the Commissioners had laid out the road, was unconstitutional and void. The case was sent to this Court for the opinion of the Judges, and

BY THE COURT—Let the report of the commissioners be set aside, on the ground that Enoch Sawyer, through whose lands the road is laid off, had not notice.

THE STATE *v.* KIRBY.

From Stokes.

Profane swearing, independent of the disturbance and injury which it may produce to those who hear it, is not indictable; it is cognizable before a justice of the peace, under the act of 1741, ch. 14: but where it is charged as a nuisance, and there is evidence to support the charge, it is indictable. Therefore,

A motion to arrest the judgment, upon an indictment which charged, "that the Defendant swore several oaths in the court-yard during the sitting of the Court, to the great disturbance and common nuisance of the citizens necessarily attending said Court," was overruled.

It was charged in the indictment, that the Defendant swore several oaths in the Court-yard, during the sitting of the Court, to the great disturbance and common nuisance of the citizens necessarily attending said Court. The Defendant submitted, and a motion was made to arrest the judgment, on the ground that the facts thus charged do not constitute an indictable offence.

LOCKE *Judge*, delivered the opinion of the Court:

We are of opinion, that although profane swearing, of itself, and independent of the disturbance and injury which it may produce to those who hear it, may not form the subject of an indictment, but is cognizable before a justice of the peace, under the act of 1741, ch 14: Yet wherever the bill charges the swearing as a nuisance, and there is
(255) evidence to satisfy a Jury that it has produced this effect, we can discover no reason why the office should not be indictable. The Defendant, then, having submitted

to this charge, is to be viewed in the same light as if satisfactory evidence had been adduced to the Jury, and they had found him guilty of the nuisance charged in the bill. Reasons in arrest of judgment overruled.

DAVIS *v.* LANCASTER, late Sheriff, &c.

From Halifax.

A Sheriff is not *fineable*, who returns his execution within the time prescribed by Law, but fails to return the money made thereon into Court, or to pay it to the party or his attorney.

The Sheriff returned upon an execution which came into his hands, that it was *satisfied*, but did not return into Court, nor pay to the party, or his attorney, the money due thereon. Whereupon the Sheriff was *fined nisi*. A *scire facias* issued, which being made known and returned, it was moved that judgment be entered against the Sheriff according to *scire facias* This was objected to, because the Law had made no provision for *fining* the Sheriff who did not pay the money into Court, or to the party or his attorney. The case was referred to this Court, to determine whether, if the Sheriff return his execution within the time prescribed by Law, but does not return the money into Court, or pay it to the party or his attorney, he is fineable?

HALL, Judge, delivered the opinion of the Court:

The act of 1777, ch. 8, sec. 5, under which the Defendant has been fined *nisi*, directs "that every Sheriff, by himself or his lawful officer or deputy, shall execute all writs (256) and other process to him legally issued, &c., and make *due return* thereof, under the penalty of forfeiting fifty pounds, &c., where such process shall be delivered to him twenty days before the sitting of the Court, to be paid to the party grieved, &c." This act being penal in its operation, is to be construed strictly. Of what is the Sheriff directed to make due return? "Of all writs and other process." If he fail to do this, he incurs the penalty. To say that a due return of the process means a transfer of the money into the proper office, as well as a return of the authority under which it was made, would be to give to the

act a more liberal construction than we are authorized to give. This opinion is confirmed by the provisions contained in the 10th section of the same act which give a summary remedy against Sheriffs who fail to pay into Court money which they have made upon executions, where their receipt of the money is evidenced by their returns upon the executions.

It is said, however, that it is of little moment to the Plaintiff, what the return upon his execution may be, if the money is withheld from him. It is surely some consequence to him to know how his rights stand; whether the money be in the hands of the sheriff, against whom he may proceed to enforce payment, or still be in the hands of the Defendant, against whom he may renew his execution. If, according to our construction of the act, there be a mischief unremedied, it is the business of the Legislature to provide a remedy: our province is to declare the law, not to give it. Our opinion therefore is, that the scire facias has improperly issued, and ought to be set aside.

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(257) THE STATE *v.* JONES.

From Franklin.

The State is not entitled to an appeal in a criminal prosecution.

The Defendant was indicted in the County Court of Franklin, and acquitted. The Solicitor for the State appealed to the Superior Court, and the transcript of the record being filed with the Clerk of the Superior Court, it was moved on behalf the Defendant, that the appeal be dismissed, on the ground that the State is not entitled to an appeal. The case was sent to this Court for the opinion of the Judges, and

BY THE COURT—The State, in a criminal prosecution, is not entitled to an appeal under any of the provisions of the act of Assembly regulating appeals: this appeal, therefore, must be dismissed.

(258) Den on Demise of JIGGITTS *et al. v.* MANEY.

From Hertford.

As the statutes of devises, 32 and 34 Henry 8th, declare that "a man *having* lands may devise them," lands acquired subsequent to the devise do not pass by it, although the devisor expressly refers to *all the lands he might have at his death*: for at the time of the devise he *had* not the lands. Yet if testator had no estate in the lands at the time of the devise, and he devises them for the payment of debts, and afterwards acquires them, a Court of Chancery will decree a sale of them.

Lands acquired subsequent to a devise, pass by a new publication of the will.

At what time a will shall be considered *as published*, under the act of October, 1784, ch. 10, sec. 5. Under this act there are two classes of cases, 1st. Where a will is found among the valuable papers or effects of the deceased; 2d, Where it has been lodged in the hands of any person for safe keeping. In each case it is necessary, to support a devise of lands, that the will be in the hand-writing of the deceased, and that his name be subscribed thereto, or inserted in some part thereof. The act makes the circumstances of the will being in the hand-writing of the deceased, with his name subscribed thereto or inserted in some part thereof, and its being found among his valuable papers, or lodged in the hands of some person for safe keeping, as equivalent to a publication before witnesses. And the publication shall be referred to *the date* of the will; not to the time of its being found among the valuable papers or effects of the deceased, or of its being lodged in the hands of a person for safe keeping.

This was an action of ejectment for lands in Hertford county; and upon the trial, the Jury found a special verdict, stating that Lewis Meredith, on the 4th day of May, 1798, made a will, and thereby devised his estate, both real and personal, to those under whom the Defendant claims: that after the date of said will, he purchased the lands in question, and died in October 1803, seised thereof: that the said will was admitted to probate in Hertford County Court, it being proved by at least three credible witnesses, that the same and every part thereof was in the hand-writing of Meredith, with his name subscribed thereto in his (259) own hand-writing, and that it was found after his death among his valuable papers. The lessors of the Plaintiff were the heirs at law of Meredith, and the question arising upon the special verdict was, whether the lands purchased after the date of the will, passed by the will? The question being sent to this Court, was argued by *Cherry* for the lessors of the Plaintiff, and by *Browne* for the Defendant.

Cherry, for the lessors of the Plaintiff, urged, that no position of Law was more certainly established, or more universally admitted, than that lands purchased after the date of a

will, cannot pass under that will without a republication thereof. The reason of the principle is plain and obvious. In the first place, a man cannot give that which he hath not: and secondly, the form of pleading such an estate, (which is evidence of the law) is, "that the testator being seised of such an estate at such a time, devised," &c. Either of these reasons is sufficient to conclude the question; and of the great number of authorities which might be produced to establish this point, one only will be cited, although the same doctrine is clearly maintained by every writer on the English Law who hath treated of this subject. The case alluded to is that of Bunter and Coke, 1 *Salk.* 106, where the Law, and the reasons upon which it is founded, are clearly and explicitly stated. Unless, then, there be some circumstance to distinguish this from the ordinary case of wills, the Plaintiffs are certainly entitled to recover.

A will of this description, it is admitted, is unknown to the Common Law, or to the Statute Law of England. But it is contended, that the intention of the Legislature of North Carolina, in passing a law declaring that a will of the description of the one now before the Court, should be good and sufficient to convey lands, was to give to such will the effect and validity of a will attested by subscribing witnesses.

(260) The act of 1784, ch. 10, sec. 5, declares, "that when any last will shall be found amongst the valuable papers or effects of any deceased person, or shall have been lodged in the hands of any person for safe keeping, and the same shall be in the hand-writing of such deceased person, and his name subscribed thereto or inserted in some part of such will, and if such hand-writing is generally known by the acquaintances of such deceased person, and it shall be proved by at least three credible witnesses, that they verily believe such will and every part thereof is in the hand-writing of the person whose will it appears to be; then and in that case such will shall be sufficient in Law to give and convey a sufficient estate in lands, tenements and hereditaments," &c. The situation of the country, and the occasional difficulty of procuring witnesses to attest wills, might and probably did render such a law necessary and proper. But it must be a very peculiar kind of Legislative magic which enables the Legislature of this State to empower any person to will lands effectually, and yet have no interest in them.

It is, however, contended, that this will became such and

had effect only when found after the testator's death among his valuable papers; that the publication of it relates to that time; or if previously published, yet remaining unaltered in the testator's possession until his death, amounts to a republication, and so in either case the lands pass under the will. To this it is answered, that to suppose a man capable of publishing or republishing a will after his death, is an idea absurd and preposterous. By death we are deprived of physical energy and intellectual power, and a will can only be published or republished by some act performed or declaration expressed by the testator in his lifetime. It will appear from the learning on this subject, collected by *Powell* in his *Treatise on Devises*, 80-1-2-6, 652-3-6-7, that a will can neither be published nor republished, but by some act done or expressions used, whether before or since the statute of frauds. It is therefore contended, that there is no
(261) circumstance in this case amounting to a republication after the date of the will, and that the period of its publication cannot be referred to any time posterior to the testator's death. The consequence is, that the lands belong to the lessors of the Plaintiff, as the heirs at law of the testator.

Browne, for the Defendant.—The date of a deed or other instrument is immaterial; it may be false, impossible, or there may be no date, and yet the deed is good. *Com. Dig. Fait. B.* 3. The statutes of 32 and 34 Henry 8th, say, "a man *having* lands may devise," and therefore, lands purchased after the devise is made, do not pass—*Com. Dig. Devise, M.* But they pass by a new publication—*Ib. E.* 2, 3, and a small matter would have amounted to a new publication, as testator's saying, "that his will lies in his box in his study."—*Ib. E.* 2. By the statute of 29 Charles 2d, it is necessary that this publication should be made before three or more witnesses. Our Legislature, in April 1784, ch. 22, did not think it necessary to adopt this cautious ceremony in its full extent, but enacted that a publication before *two* witnesses should be sufficient. Before the passing of these acts requiring the attestation of witnesses, if a man had made his will, and twenty years afterwards on his death-bed, said "It *was in a box in his study*," that would have been a sufficient republication to pass all lands which he had at that time. It was not then, nor is it now, the date, the time of

writing, nor the signing, but the time of publication or republication which the law regards. The act of October, 1784, ch. 10, sec. 5, professes to except, and does except some cases out of the act requiring a publication before witnesses, and declares the wills in those cases good without such publication; but substitutes another requisite in place of such publication, namely, "being found among the testator's valuable papers or effects." And as the wills in the cases under the act of April, 1784, operate not from the date, nor time of writing, nor of signing, but from the publication before witnesses, so in those under the act of October, of that year, they ought to operate, not from the date, &c., but from their being found "among testator's valuable papers or effects." A man may make his will in his own hand-writing and sign it, but if he leave it on his table, or throw it aside among waste papers, that does not make it his will, because "it has neither been found among his valuable papers or effects," nor "lodged in the hands of some person for safe keeping;" one or the other of which circumstances is required to give it force and operation.

(262)

The words of the act necessarily require this construction. "*Then* (at that time) *and in that case*," necessarily originate the question, *When* (at what time) and in what case? The act itself answers this question: "When any last will shall be found," &c., or "shall have been lodged," &c. This answers the question as to the time. Vide *Johnson's Dict.* When. Now "in what case?" The act answers this also: "and in case the same shall be in the hand-writing," &c.

It is natural to man to wish to dispose of his property after his death, and there is no period in the history of our Law, in which our forefathers did not enjoy it at least as to personal property. Although the spirit of the feudal system prevented it for some time as to lands, yet, as the rigour of that system began to abate, men asserted their right of disposing of their lands: first of two thirds, then of the whole. Men often deny themselves the comforts which they could otherwise afford, in order to increase the stock which by their wills they are to distribute among their favorites. For this purpose they continue to labor, to exert their talents, their patience in supporting hardships, and their fortitude in encountering dangers and surmounting difficulties, much

longer than they otherwise would do. This motive
(263) sets all their faculties in operation, and continues to invigorate and propel them; and as all public benefit is derived from the exertion of individual industry and talents, the public ought surely to encourage the motive from which that exertion springs. The public do encourage it, by permitting men to dispose of their property by will, and the Courts of Justice have adopted many rules cherishing this motive, particularly two: "*That wills shall be favoured;*" and "*That the intention of the testator shall be the polar star to guide the decision.*" Under the influence of these rules and this disposition, it has always been clearly held, that if a man make his will, devising "all his property," personal property afterwards acquired shall pass. Why not lands likewise? The only reason assigned is, that the Legislature used the word "*having*," in the statutes of 32 and 34 Hen. 8th. But here is a case under a very different statute, the words of which seem to require that all the lands of which the testator was seized at the time of his death should pass by the will. If, however, there could be a doubt on the words of the will, the Court will adopt these general rules; they will favour the will; they will be guided by the intention of the testator; they will say the same words in the same will shall have the same meaning when applied to real as to personal estate.

The following opinion was forwarded by TAYLOR, Judge, and concurred in by the Court:

All the circumstances required by the act of October, 1784, ch. 10, to constitute a valid devise of lands, are stated in this case to have attended the execution and probate of Meredith's will. 1st. It was in the testator's hand-writing, and his name subscribed thereto. 2d. It was found after his death among his valuable papers. 3d. It was proved by three credible witnesses. Of the sufficiency of the will no doubt
can be raised. The remaining question is, what
(264) passed under the will? If the lands sued for passed by the will, the judgment of the Court must be for the Defendant: if not, the lessors of the Plaintiff, who are the heirs at law, are entitled to recover.

The difference in the rule of Law, between real and personal property acquired after making the will, may probably have been derived from the policy of feuds, according to

which no heir was appointed, to whom chattels should descend. Upon the death of the owner, they belonged to the ordinary. To appoint an executor, therefore, was to appoint an heir, upon whom the testator's chattels should descend at his death, and who stood exactly in the situation of the testator, and acquired a right to all, as well those which were acquired after making the will, as those which were possessed before it. But as to freehold property, the Law was different: an heir was already appointed, the course of succession traced out, and immediately upon the acquisition of a feud by the ancestor, an imperfect right belonged to the heir in his own right. Thus it became necessary to insert the word "heirs" in the deed, whenever an inheritance was conveyed. It then vested in the purchaser and his heirs, and could not be disposed of but by some act subsequent to the acquisition of it. For if an estate could be passed by any act prior to the acquisition of it, two incompatible titles would meet together; the title of the heir created by law, the title of the assignee created by the seller. But that of the heir being the most favoured title, must prevail. The effect of a disposition of real estate, to take effect after the death of the donor, is to deprive the heir of the succession established by law in his favor; the consequence of disposing of the personal estate is to appoint an heir. The first must therefore operate as a present conveyance by the ancestor, to take place in future against the title of the heir: the latter is to appoint an heir to all the personal property of which the ancestor dies possessed. The will as to personals
(265) does not speak until after the testator's death, but as to real property, it refers to the date; because it is considered in the nature of a conveyance by way of appointment. Hence a man cannot devise lands which he has not at the date of the conveyance. Whatever may have been the origin of this rule, or however artificial the reasoning may seem, upon which it is supported, it is too firmly fixed and interwoven in our system of laws, to be shaken at this day. In confirmation of the numerous cases to be found in the books, some have been decided in this State, and much property is held and much litigation prevented, by a confidence that the law in this respect is certain and established. Indeed, it would be difficult, if not impossible, to find a single case of sufficient authority to countenance the Court to alter the rule of decision, should they even be strongly

called upon to do so, by circumstances of peculiar hardship. For in the case of Bunker *v.* Cook, 1 *Bro. P. Cas.* 199. finally decided in the House of Lords, it was held that lands purchased after the making of the will which devised them to the wife, and expressly referring to all the testator might have a right to at the time of his decease, although purchased with money received by the testator in right of his wife, would not pass by the will. In that case the law was deemed imperative, although the Judges when they delivered their judgment, declared their belief that the testator intended the lands in question should go to his wife.

Exceptions have been established in particular cases, where the testator has an equitable estate in lands, and devises them for the payment of debts: and, indeed, there are authorities that go so far as to hold, that if lands are devised for the payment of debts, although the testator had no estate whatever at the time of the devise, a Court of Chancery will decree the sale of them. But it is not necessary to consider the peculiar grounds of these exceptions, since the pres-
(266) ent case does not fall within any of them. Judgment for the Plaintiffs.

LASH *et al. v.* GIBSON.

From Stokes.

A. and B. having obtained judgments before a justice of the peace, sued out executions, which were levied upon the lands of the Defendant; and the executions so levied were returned into the County Court for orders of sale. The executions were levied on different days, but the orders of sale were made at the same term of the Court, and writs of *venditioni exponas* were issued thereon. At the same term, C. obtained a judgment in Court against the Defendant, and sued out a *fieri facias*, which was levied upon the same lands; and the Sheriff sold the lands under all these executions, and paid the money into Court; and it being insufficient to discharge all the executions, application was made to the Court for an order of distribution. The execution from the justice, which was *first levied*, is to be first satisfied: and the money is to be distributed according to the priority of the levy of the executions.

Lash and others recovered judgments against John Moore, before a justice of the peace, and sued out their executions, which were levied on a tract of land belonging to Moore, no

personal property being found. The executions so levied, were returned to December term, 1807, of Stokes County Court. The levies were made at different times, one on the 30th November, another on the 2d December, 1807, &c.

Gibson sued out a writ against Moore, on the 29th August, 1807, returnable to September term following, when judgment by default was taken, and at December term following, final judgment was obtained; and at the same term, orders of sale were granted upon each of the aforesaid levies.

Writs of *venditioni exponas* were issued upon each of the orders of sale, commanding the Sheriff of Stokes to expose to sale, the land levied upon by the executions afore-
(267) said, issued by a justice of the peace. A writ of *fieri facias* was issued upon Gibson's judgment, which was levied by the Sheriff upon the land aforesaid, before the writs of *venditioni exponas* came to his hands. The sale of the land was advertised and made, both under the writ of *fieri facias* and the writs of *venditioni exponas*. The money arising from the sale was paid into the office, and it being insufficient to discharge all the executions, a question arose among the creditors, how the money was to be distributed? Whether each was to receive a rateable proportion, or whether the executions were to be satisfied according to the priority of levy? And, lastly, whether Gibson, being a judgment creditor in Court, and having obtained judgment by default at September term, was not entitled to a preference?

LOWRIE, Judge, delivered the opinion of the Court:

We are not suprised that a case should arise circumstanced like the present; but it is not difficult to discover the principles by which it ought to be governed. In every country enjoying a jurisprudence like ours, collisions of interest like the present will often happen. It is an invariable rule, founded upon the principles of morality, that every man ought to enjoy all the fruits of an honest and laudable vigilance: upon this principle the maxim is bottomed, that the Law favours the vigilant and not the supine. We are therefore of opinion, that the money collected by the Sheriff, on the executions returned in this case, ought to be distributed according to the priority of the levy of the executions. And even admitting that the judgment of Gibson in the County Court, which is a Court of record, bound the land, the orders of sale are equally judgments of the same Court; and

although Gibson may have obtained his judgment earlier in the term than the orders of sale were granted, this will not vary the case, for the whole term is but one day in contemplation of Law. Each execution has a lien upon
(268) the land from the time of the levy, and the orders of sale had relation back to the times the levies were actually made; for the Sheriff was not bound, in order to make a sale, to *levy* the writs of *venditioni exponas*. By these writs, he was to expose to sale the land already levied on, and thus complete the act commenced by the levy. The judgment of the Court therefore is, that the executions first levied be first satisfied.

Den on Demise of CLEVELAND *v.* GRIME.

From Ashe.

Motion to file a new declaration in ejectment, the original being lost out of the office, and Defendant served with notice to produce a copy, disallowed.

A motion was made on behalf of Plaintiff, for leave to file a new declaration according to the courses of his deed, it appearing that the declaration which had been originally filed, was lost out of the office, and that a notice had been served on the Defendant to produce the copy of the declaration which had been delivered to him at the commencement of the suit, and it was referred to this Court to decide whether the motion should be allowed.

BY THE COURT—Let the motion be disallowed.

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(269) THE STATE *v.* HERNDON AND BLEDSOE.

From Wake.

A witness for the State who is called out upon his recognizance, and has judgment *nisi*, for the forfeiture, entered against him, may apply to the Court for a remission of the forfeiture before a *scire facias* issues against him.

The Defendants were bound in recognizance to give evidence in behalf of the State against George Evans, upon an indictment in Wake County Court, and being called, failed to appear; whereby they incurred the forfeiture of twenty pounds each, and judgment *nisi* was entered against them. During the same term at which they were so called out, they came before the Court personally, and made application for a remission of said forfeiture. This application was opposed, on the ground that there was no process before the Court authorising them to take cognizance of this application, and that before the Court would hear the excuse of Defendants for their failure to attend, they must be brought in to answer upon a *scire facias*. The case was referred to this Court, and

BY THE COURT—We think it is discretionary with the Court to hear the excuse of the witness at the first Term, and that it is proper to do so, unless it be shewn that the State would receive some injury thereby; and in that case, the excuse ought not to be heard until the succeeding Term.

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(270) THE STATE *v.* GROFF.

From Anson.

An accessory is not liable to be tried, as for a misdemeanor, where the principal is amenable to justice. The act of 1797, ch. 19, does not infringe this rule. That act only extends to cases "where the principal escapes and eludes the process of law."

The Defendant was indicted for receiving stolen goods, knowing them to be stolen. The principal, a negro slave, had not been indicted; he resided in the county of Anson, and was amenable to the law. It was urged that the Defendant being an accessory could not be tried until the principal was tried and convicted. The case being sent to this Court was argued by

A. HENDERSON, for the Defendant.—By the Common Law, an accessory cannot be tried until the guilt of the principal is made judicially to appear. His guilt is not of a primitive nature, it is entirely derivative, dependent upon the guilt of the principal, and until that guilt appears, the Court cannot be convinced that the accessory is guilty. This fun-

damental rule of Criminal Law, bottomed on the soundest principle of justice, and the wisdom of which, experience has completely verified, ought in no instance to be departed from, except from imperious necessity. The case discloses the fact, that the principal is amenable to justice. The act of 1797, ch. 19, did not intend to infringe this fundamental rule, except in the instances mentioned in the preamble to the act, "where the principal escapes and eludes the process of law." It does not contemplate the case of subjecting the accessory to trial before the principal, where the principal was amenable to justice. The impossibility of prosecuting the principal, creates the necessity which the act contemplated, of departing from the rule of the Common Law.

Our act of Assembly is the same in substance with
(271) the act of Anne upon the same subject. That act subjects the accessory to trial before the principal, "*where the principal cannot be taken*," and makes the prosecution a bar to another prosecution, in the event of the principal being afterwards convicted. Our act makes the same provision. These two statutes ought to receive the same exposition, as they both intend to provide against the same mischief. This mischief, and the remedy intended by the Legislature to correct it, is mentioned to be the same in the preamble to the act of Anne, and also of our act of 1797. Judge Foster, in expounding the act of Anne, *Foster* 374, confirms the exposition contended for on behalf of the Defendant in this case, and gives it as his opinion, that the accessory is in no instance liable to be tried, even as for a misdemeanor, under that act, where the principal is amenable to justice. A subsequent act was passed upon this subject, in the reign of George 3d—3 *Term Rep.* 83—And that expressly makes the accessory liable to be tried, whether the principal be amenable to justice or not.

BY THE COURT—We are clearly of opinion, that as the principal lives in the County of Anson, and is amenable to the Law, he ought to be convicted before the accessory is put upon his trial.

(272) Den on Demise of BICKERSTAFF *v.* DELLINGER.

From Lincoln.

The Plaintiff in error, upon a reversal of the judgment, is not entitled to restitution for lands sold under an execution issued upon the judgment, but to the money arising from the sale.

This was an action of ejectment for lands in Lincoln, of which Bickerstaff, the lessor of the Plaintiff, was seised on the 17th February, 1787, when Henry Dellinger having obtained a judgment against Bickerstaff, in Lincoln County Court, and sued out his execution, the lands were levied on and sold by the Sheriff, and said Dellinger the Plaintiff in execution, became the purchaser; whereupon the Sheriff executed to him a deed for the lands, bearing date the said 17th February, 1787. Henry Dellinger conveyed the lands to Jacob Dellinger, the Defendant, in March, 1796.

In September, 1798, Bickerstaff brought a writ of error to reverse the judgment which Henry Dellinger had recovered, and upon which the lands had been sold. At September term, 1801, of Morgan Superior Court, the judgment was reversed, and the Plaintiff in error was ordered to be restored to all things by him lost by means of that judgment. This ejectment was brought in the year 1807, and the case was sent to this Court upon the question, "Whether the reversal of the judgment divested the title which the Sheriff's deed had conveyed, and entitled Bickerstaff to be restored to the lands?" The following opinion, forwarded by

TAYLOR, *Judge*, was concurred in by the Court:

This ejectment is instituted upon the ground that the lessor of the Plaintiff is entitled to a restitution of the land upon a reversal of the judgment under the authority of which it was sold, because Henry Dellinger, the Plaintiff in the original action, and the Defendant in error, became the (273) purchaser. It must be conceded that the general rule of Law is, that upon the reversal of a judgment, the Plaintiff in error is entitled only to the money raised by the sale. If it were otherwise, few persons would be willing to take upon themselves the risque of buying property at a Sheriff's sale, of which they might afterwards be deprived in consequence of some error in the judgment, to the examination of which they would not be parties, and on which they could claim no right of being heard. If a different rule apply to the case where the Plaintiff himself becomes

the purchaser, it must be supported by some authority, and we cannot perceive, in any of the cases relating to this point, that conclusive force which ought to establish so important an exception to a fixed principle of Law. In this State, lands are liable to be sold upon the *fieri facias*, in like manner with chattels As the Plaintiff in the original judgment, might, under a *fieri facias*, become the purchaser of goods, he may now become the purchaser of lands, and if the Plaintiff in error is entitled to a restitution of lands, upon the reversal of the judgment, because the Defendant became the purchaser, he must be equally entitled to the restitution of goods for the same reason. It is also a necessary consequence of this doctrine, that the Plaintiff in the original action, purchasing the goods, cannot sell them, so as to convey a valid title against a subsequent reversal of the judgment, but they must still remain liable to the right of restitution, by reason of the original vice impressed upon them in being bought by a person who had a legal right to purchase, and from a person commanded by Law to sell, and having a right to sell to the Plaintiff.

If such were the Law in England, it is probable some cases might be found where suits have been instituted against subsequent purchasers of chattel property, or even against the plaintiff in the original judgment, in behalf of (274) the Plaintiff in error claiming restitution after a reversal. No such cases are recollected. As to the point of restitution, the first case that occurs, and I believe strongest in favor of the Plaintiff, is to be found in *Cro. Jac.* 246. It was there held, that the sale and delivery of a lease to the party himself upon an *elegit* was void, and that upon a reversal, the Plaintiff in error was entitled to restitution. The Court took this strong difference between an *elegit* and a *fieri facias*, that in the former, the sale and delivery is not in pursuance of the writ; but the writ of *fieri facias* gives the authority to the Sheriff to sell. They do not go so far as to say, that a sale by *fieri facias* to the party himself, shall deprive the Plaintiff in error of restitution, nor do they intimate that he is entitled to restitution because the sale was made to his adversary, but because he does not come *duly thereto by act of Law*. Here the lease was delivered to the party that recovered, by way of extent, without any sale, and therefore the owner shall be restored: so, if upon an *elegit*, personal goods are delivered to the party by a reasonable

price and extent, upon the reversal of the judgment, he shall be restored to the goods themselves.

This case appears to have been decided upon reasons exclusively applicable to the writ of *elegit*, between which and the *fieri facias* there is a difference so manifest, as to require a different construction of the Law regarding restitution. For, 1st, By an *elegit* the Defendant's goods and chattels are not sold, but only appraised: whereas, by a *fieri facias* they are sold without any previous appraisement by a Jury. 2d. By an *elegit* they are delivered to the plaintiff at a reasonable price and extent: whereas, in a *fieri facias* they cannot be delivered to the Plaintiff in satisfaction of his debt, but must be sold. 3d. By the first, a moiety of the Defendant's lands are delivered to the Plaintiff, till his debt be levied out of the rents and profits; but by the latter, they are absolutely sold to the best bidder, whether he be the Plaintiff or a stranger. The well known effect of a seizure of (275) property under a *fieri facias* is to divest the title by the authority of Law; but under the *elegit* nothing is finally settled until the inquisition is returned and filed, before which the Court may examine it, and upon the detection of irregularity, may award a new writ.

When a judgment is reversed, the Defendant is to be restored to what he lost by the writ as it was awarded. In a *fieri facias* he loses the money, because the Sheriff is commanded to make the money out of the Defendant's goods and chattels, lands and tenements; and to that, therefore, he is properly restored. But in an *elegit*, the goods themselves are delivered over to the Plaintiff, and upon a reversal, the Defendant must be restored to them. We are therefore of opinion, that the Plaintiff in error is not entitled to restitution even against the Plaintiff in the original judgment, where the sale has taken place under a *fieri facias* and without fraud.

WARDEN & SONS *v.* NIELSON.

From Burke.

In a suit upon a penal bond, the Plaintiff is not entitled to recover beyond the penalty.

This was an action of debt, brought upon a penal bond

given by the Defendant to the Plaintiffs, merchants in Philadelphia, on the 6th day of November, 1774, payable 1st day of February, 1775. The Defendant removed from Pennsylvania, and settled in this state. On the 15th May, 1794, the Defendant wrote to the Plaintiffs, acknowledging the debt, and praying further time for payment. On 26th December, 1805, he wrote to the same effect, and on the 4th November, 1806, he wrote to the agent of the Plaintiffs, expressing a hope that they would take the amount of the pen-
(276) alty of the bond, divided into three annual payments. Defendant failing to make payment, this suit was commenced on the bond, the condition of which was in the following words:

"The condition of the above obligation is such, that if the above bounden William Nielson shall well and truly pay to the said Jeremiah Warden & Sons, the just sum of seven hundred eighty-two dollars and twenty one cents, with lawful interest until paid, then the above obligation to be void, otherwise to remain in full force and virtue."

The Jury, under the direction of the Court, gave a verdict for the penalty of the bond, to wit, fifteen hundred sixty-four dollars and forty-two cents; and seven hundred and fifty dollars ninety-five cents for interest, by way of damages, subject to the opinion of the Court whether the Plaintiffs were entitled to recover beyond the penalty of the bond.

For the Plaintiffs were cited, *Bunbury*, 23—2 *Term Rep.* 388—*Buller's N. P.* 178—1 *Tidd's Practice*, 483—2 *Dallas Rep.* 252. And it was urged, that in contemplation of Law, the condition is the principal part of the obligation, the penalty being merely an accessory. In the condition of this bond, the obligor binds himself expressly to pay lawful interest till the principal is paid. Shall, then, the penalty, which is merely accessory to the principal part of the obligation, and inserted for the benefit of the obligee, control the express contract of the Defendant, contained in the principal part of the obligation? *Pothier*, 223-225.

For the Defendant were cited, 1 *East. Rep.* 436—2 *Atk.* 75—6 *Term Rep.* 303—*Doug.* 49—*Eq. Ab.* 92—3 *Ves. jun.* 557.

WRIGHT, Judge, delivered the opinion of the Court:

Whether in an action of debt on a penal bond, the Plaintiff can recover a greater sum than the penalty, seems

to have been a question for a long time unsettled
(277) in the English Courts; but from an examination
of the cases cited upon the argument of this case, it will appear always to have been the better opinion, that no such recovery could be had, at least in a Court of Law, until the decision reported in 2 *Term Rep.* 388, made by Justice Buller, in conformity with the opinion expressed in his *Law of Nisi Prius*, 178. This decision, however, was afterwards overruled by Lord Kenyon, 6 *Term Rep.* 303. And in the case of M'Clure *v.* Knight, 1 *East. Rep.* 426, the Law seems to have been considered by the counsel and the Court as settled: for the only question made in the argument was, whether on a judgment rendered in Ireland on a penal bond, the Plaintiff in a suit brought in England on such judgment, was entitled to recover beyond the penalty? which was properly decided in the affirmative, on the ground that the nature of the demand was altered by the judgment, and that it was competent for the Jury to allow interest on what was there ascertained to be due. The other cases cited by the Plaintiff are *Bunbury* 23, and 2 *Dallas* 252.

The first is a Chancery decision, and is reported by the Reporter in a line and a half; in which he states "that interest was decreed to be paid on a bond, although it exceeded the penalty." But none of the Cases to which he refers support the principle of the decree, and some of them are entirely opposed to it. The first from *Hardress* 136, was a bill to be relieved against an extent on a judgment in debt for a penalty of £1500, after satisfaction of the penalty by perception of the profits according to actual receipts, but not according to the extended value. The Court would not give the Complainant relief without paying costs and damages; for it appeared there had been a default in him in not permitting the Defendant quietly to receive the profits upon a former extent, whereby he was put to great charges, and the Court
declared the Plaintiff should either have all Law or
(278) all Equity. 1 *Ch. Ca.* 271, was the case of a jointress
who had paid a mortgage, and she was permitted to hold over until repaid with interest. The other cases, 2 *Ch. Ca.* 226, and 2 *Ver.* 509, are in direct opposition to the principle which they were cited by *Bunbury* to support: To which may be added the cases reported in 1 *Atk.* 75. 3 *Bro.* 489, 496. 1 *Ver.* 349, referred to by Defendant's Counsel. The other case cited by the Plaintiff's Counsel from 2 *Dallas* 252,

would at first view seem to conflict with the English decision; but it is believed a distinction may be drawn between that case and those decisions That was a suit on a penal bond conditioned for the performance of a collateral act, on a stated day, to-wit, the procuring of a patent within six months for a tract of land which the Defendant had sold to the Plaintiff. The Judges, in delivering their opinion, considered the penalty as a debt due to the Plaintiff, on the day when the collateral act was to have been performed, and that upon that ground he was entitled to retain a verdict for interest beyond the penalty which the jury gave for the detention of the debt. From a review, therefore, of the cases on the subject, it may be considered as a settled point, that except in some particular cases, where a collateral act is to discharge a penalty which is inserted in a bond as a debt which is to become due on the failure of performing that act on the day stipulated; or in cases in Equity framed upon some specific ground of relief, the penalty of the bond is all that can be recovered, either at Law or in Equity. As to the question made by the Plaintiff's Counsel, whether there is any difference between common conditions to penal bonds and the one sued on, which binds the obligor to the amount of the condition with interest till paid; this is nothing more than a condition in Law, which would arise without its being stated in the bond, and was inserted either from an ignorance of the Law, or from an excess of caution: But it cannot be considered as intended to increase the obligation of the Defendant. It is therefore the opinion of the Court, that
(279) the Plaintiff should enter a Remittitur for the amount assessed for interest by way of damages.

RAYNOR *v.* DOWDY AND BENTHALL.

From Bertie.

The County Court may grant to a man the privilege of erecting and keeping a Ferry, although he does not own the lands on either side of the river or creek, over which the Ferry is established.

The County Court of Hertford, granted to Raynor, the Plaintiff, the privilege of erecting and keeping a ferry on Wicacon Creek. The Defendants brought an ejectment

against Raynor for the land whereon the ferry was erected, recovered a judgment, and the Sheriff of Hertford County put Benthall in the possession of the land, but refused to put him in possession of the ferry. Benthall demanded possession of the ferry, which being refused, he armed himself with pistols and took possession of the ferry. At the time the County Court of Hertford granted to Raynor the privilege of erecting and keeping this ferry, he did not own the land on either side of the creek. The jury found a verdict for the Plaintiff, and assessed damages for the trespass, subject to the opinion of the Court upon this question, "Whether the County Court of Hertford had a right to grant to Raynor the privilege of erecting and keeping this ferry when he did not own the lands on either side of the creek?" The case being sent to this Court, was argued by

CHERRY, for the Plaintiff.—The act of 1784, ch. 14, sec. 1, declares "that the Courts of the several counties in this State shall have full power and authority to appoint and settle ferries, and to order the laying out public roads (280) where necessary, and to appoint where bridges shall be built." This act places the establishment of ferries entirely in the discretion of the County Courts. The passage of a stream across a public highway is to be considered as a part of the highway, in which all the citizens have a property in common. If it be not so considered, and the County Courts are to be restricted in their discretion, in laying out public highways and settling Ferries, much public inconvenience will result. The owner of the land on each side of the public road may be unwilling to keep a ferry, and if the right to keep one can be granted to no other person, the consequence immediately follows, that no ferry can be had. Or if different persons owned lands on opposite sides of the same river or creek, (and no one could keep a ferry but the owner of the land on each side of the road,) if either of the owners of the land were obstinate, foolish or capricious, no ferry could be kept up, as the owner on one side could prevent his neighbor on the other side from landing. The public high roads are public property, and subject to the control of the constituted authorities of the country. Were this not the case, it would be impossible to have any intercourse with, or conveyance to many of the towns of this State, where there is no County

Wharf. The citizens owning the land on each side of the street would have it in their power to prevent any person from landing, unless a landing could be effected on the public street.

BY THE COURT—We are of opinion that the County Court of Hertford had a right to grant to the Plaintiff the privilege of erecting and keeping a ferry, although he did not own the land on either side of the creek. Let judgment be entered for the Plaintiff.

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(281) JONES *v.* SYKES.

From Cabarrus.

Appellant bound to give two securities, and one only being given, appeal dismissed.

The Plaintiff prayed an appeal from the judgment of the County Court of Cabarrus, and executed an appeal bond with one security only. At October Term, 1808, the Cabarrus Superior Court, Defendant's counsel moved to dismiss the appeal, on the ground that the act of Assembly regulating appeals required the appellant to enter into bond with two securities; and the case being sent to this Court upon the motion to dismiss the appeal,

BY THE COURT—The motion must be allowed. Entering into bond with two securities is a condition to be performed before the party dissatisfied with the judgment of the County Court can obtain an appeal. Let the appeal be dismissed.

THE STATE *v.* SUTTON *et al.*

From Bertie.

The caption of an indictment must describe the Court before which it is found, that it may appear the Court can exercise jurisdiction over the offence charged.

The Defendants being convicted upon an indictment for a riot, their counsel moved in arrest of judgment "that in the caption of the indictment upon which the Defendants had

been found guilty, there was no description of the Court before which the indictment was found." The caption of the indictment was in the following words and figures:

(282)

"STATE OF NORTH CAROLINA, } *April Term, 1803.*"
Bertie County. }

Cherry for Defendants, cited 2 *Hawk.* 359, *sec.* 119, to prove that the caption of an indictment must shew that the Court had or could exercise jurisdiction over the offence indicted. He said there was no such term of the Superior or County Courts of Bertie as *April term*, known, distinguished or described by any public law; for if so, the Court would be bound officially to take notice of it. April term was a judicial term unknown to the laws of North Carolina, so far as it affected the County of Bertie; the session of Bertie County Court was not holden in that month; and as to the Superior Courts of the State, their terms were fixed by the act of 1806, commencing on the first Mondays of March and September, and ending as the circuits progressed, on the sixth Mondays after the fourth Mondays of the said month.

BY THE COURT—The caption of the indictment ought to describe the Court before which it is found, that it may appear the Court can exercise jurisdiction over the offence charged. It is not stated in the caption to this indictment, whether it was found in the County or Superior Court. And although it may be true, that the term of the Superior Court happened in April, yet "April Term" is not distinguished as a judicial term of that Court in any act of Assembly. Judgment arrested.

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(283) GARDNER *v.* CLARK.

From Chowan.

Debt lies by the payee against the maker of a promissory note, expressed to be given for "value received."

This was an action of debt, brought upon a promissory note in the words and figures following to-wit:

"Five days after date, I promise to pay to Henry Gardner, or order, one hundred and seven dollars 75-100, value received. Edenton, July 31st, 1805. WM. CLARK."

The case was referred to this Court, upon the question, "Whether an action of debt can be maintained on this note."

LOWRIE, Judge.—Debt is an action founded on an express contract for a sum certain. A writ of debt properly lieth where a man oweth another a certain sum of money by obligation, or by bargain for a thing sold, or by contract, or upon a loan made by the creditor to the debtor, *Fitz. N. B.* 273. If a tailor agree to have a certain price for making a suit of clothes, debt will lie, *Woods Inst.* 544. A man owes another a sum of money, who hath his note under hand without seal, debt will lie. This position is laid down by Morgan and Ruffhead, in their Law Dictionary, *Title, Debt.* Debt lies on a promise to a Physician, Surgeon, &c., if he make a cure, *Com. Dig.* 3 *Vol.* 365. These authorities prove that debt will lie on a simple contract. It has been said and so adjudged, that before the statute of the 3d and 4th Anne, no action would lie upon a note, as a note, *Salk.* 129. And that *indebitatus assumpsit*, would not lie on a bill of exchange. *Stra. Rep.* 680. The same doctrine was held in the case of Hodges and Stuart, 1 *Salk.* 125. And it was there said by Holt, Chief Justice, that *indebitatus assumpsit* would not lie on a bill of exchange for want of a consideration:
(284) For it is but evidence of a promise to pay, which taken alone is a *nudum pactum*, and therefore the party must either bring a special action on the custom of merchants, or else a general *indebitatus assumpsit*, against the drawer for money received to his use.

But Lord Mansfield declared, that all the cases upon this subject decided in King William's time, went upon mistaken principles; and the truth of this observation will be admitted, if we take the trouble of examining the course of decisions upon the subject. In the year 1738, upon a writ of error from Ireland, in the case of Otway *v.* Ramsay, *Strange*, 1090, after two solemn arguments, and a third one ordered, the Court strongly inclined to the opinion that debt would not lie in Ireland, or a judgment in the King's Bench, in England. The Plaintiff, however, declined a third argument, and the judgment was affirmed, without the opinion of the Court being given. But forty years afterwards, in the case of Walker *v.* Witter, *Doug. Rep.* 1, 2, it was adjudged that debt would

lie on a foreign judgment. In the case of Hodges *v.* Stuart, *Salk.* 125, in the time of William 3d, it was held, that bills and notes, payable to bearer, or to A. B. and bearer, were not negotiable or assignable, so as to enable the indorsee to maintain an action against the drawer: but in the time of Geo. 3d, in the case of Grant *v.* Vaughan, Lord Mansfield said, "There has since been no doubt but that actions may be brought by the bearer of such promissory note against the drawer." *Lovelace on Bills*, 108.

There is an anonymous case reported by *Hardress*, 485, that seems to unfold the principles upon which this case must be decided. The effect of that case is very accurately expressed in *Com. Dig. Debt B.* Lord Chief Baron Comyn, after saying that debt lies on every express contract to pay a sum certain (*A.* 8,) and also lies though there be only an implied contract, (*A.* 9,) thus states the principle of these cases: "So debt lies not upon a bill of exchange (285) against the acceptor; for the acceptance binds him by the custom of merchants, but does not raise a duty," and cites *Hardress*, 485. The case in *Hardress* was debt against the acceptor of a bill of exchange, and the Court there said, "The acceptance does not create a duty, no more than a promise made by a stranger to pay the debt of another if the creditor will forbear his debt." In Hard's case, 1 *Salk.* 23, it is also said, that *indebitatus assumpsit* will not lie against the acceptor of a bill of exchange; for his acceptance is but a collateral engagement: but that it will lie against the drawer, for he is really a debtor by the receipt of the money. So in the case of Hodges *v.* Stuart, before quoted for another purpose, the Court said that debt would lie against the drawer of a bill of exchange for *value received:* and the reason given is, "that it is for the apparent consideration." As debt will lie where *indebitatus assumpsit* will, and as the statute of Anne puts notes on the same footing with bills of exchange, it would seem clearly to follow, that an action of debt may be maintained by the payee of a promissory note against the drawer.

HALL, Judge.—The case of Bishop *v.* Young, 2 *Bos. & Pul.* 78, seems to decide the present case. The question there was, "Whether debt would lie by the payee against the maker of a promissory note, expressed to be for value received." It was decided in the affirmative; and for the reason there

given, I think the present action can be supported, and that judgment should be entered for the Plaintiff.

TAYLOR, Judge, filed the following opinion. In *Hardress*, 485, it was held that an action of debt will not lie against the acceptor of a bill of exchange; but the reasons given for that determination, tend strongly to demonstrate that an action of debt will lie by the payee against the maker of a promissory note. It was said in that case, that the ac-
(286) ceptance does not create a duty any more than a promise made by a stranger to pay the debt of a third person, if the creditor will forbear his debt: and he that drew the bill continues debtor, notwithstanding the acceptance makes acceptor liable to pay it. But the making of a promissory note does manifestly create a duty, if a consideration be expressed, and raises an original obligation in the maker, for which an action of debt is a proper remedy, according to the general description of that action to be found in all the elementary writers. *Blackstone* 3 vol. 155, says, an action of debt will lie whenever a sum of money is due by certain and express agreement, where the quantity is fixed and certain, and does not depend on any subsequent valuation to settle. Comyns says, debt lies upon every express contract to pay a sum of money—*Dig. Tit. Debt.* And in *Woodeson* 3 vol. 95, it is laid down, that the action of debt may be brought whenever a determinate sum is claimed as due, whether the contract on which it arises is special or simple.

The action of debt on simple contract has grown much into disuse, in consequence of the Defendant being permitted to wage his Law, and of the necessity imposed upon the Plaintiff of proving his whole debt, or being precluded from recovering any part. This latter rule has been much relaxed in modern times, as appears from 2 *Bl. Rep.* 1221—*Doug.* 6—2 *Term Rep.* 129—1 *H. Bl* 149; and it is not now understood to be necessary that the plaintiff should recover the exact sum demanded. From this disuse of the action, a belief seems to have prevailed, that it could not be sustained; and assumpsit has been the usual remedy on promissory notes. But no decision is recollected to have been made in this State against the action of debt in such cases, and there is a great modern authority in favour of it in precisely such a case as that before the Court—2 *H. Bl.* 78. Judgment for the Plaintiff.

(287) THE STATE *v.* WHITSENHUNT.

From Lincoln.

Solicitor for the State entitled to a fee in case of a scire facias v. a delinquent juror, in all cases were costs are given against such juror.

The question in this case was, whether the Solicitor for the State was entitled to a fee in the case of a *scire facias* against a delinquent juror?

BY THE COURT—The Solicitor for the State is entitled to a fee on a *scire facias* against a delinquent juror, in all cases where costs are given against such juror. Where the juror is discharged without costs, the Solicitor is not entitled to a fee.

HOWE *v.* O'MALLY.

From Chowan.

A. conveyed to B. a tract of land, containing 221 acres, more or less. Some years afterwards it was mutually agreed to have the land surveyed, and if it were found to contain more than 221 acres, the defendant should pay the Plaintiff ten dollars per acre for the excess: if it fell short, Plaintiff to refund to Defendant at the same rate. Here are mutual promises, and one is a good consideration, to support the other.

The Plaintiff, by a deed of bargain and sale, conveyed to the Defendant, in the year 1790, one hundred and forty-five acres of land, part of a tract of three hundred and sixty-six acres, purchased from Clement Hall. In the year 1792, the Plaintiff, by another deed, conveyed to the Defendant a part of the same tract of land, purporting to contain two hundred and twenty-one acres, "be the same more or less."
(288) Each tract was described by particular metes and bounds, and both together made up the whole tract purchased from Clement Hall, by the Plaintiff, for which the Defendant fully paid and satisfied the Plaintiff.

Some time afterwards, to-wit, in the year 1806, in a conversation between the parties, it was mutually agreed to have the tract of two hundred and twenty-one acres last sold, surveyed, and if it were found to contain more than two hundred and twenty-one acres, (the number of acres called for

by the deed,) the Defendant should pay to the Plaintiff ten dollars per acre for the excess; and if, on the other hand, it should fall short of that number of acres, the Plaintiff should refund to the Defendant at the same rate per acre. In the month of October, 1806, a survey was accordingly made, and the tract was found to contain three hundred and eight acres, including swamp on two of the lines, eighty-seven acres more than the deed called for. This action was brought to recover the sum of eight hundred and seventy dollars with interest, &c.

For the Defendant, it was contended first, that unless from the presumption that the agreement proved, subsisted between the parties, at the time of the execution of the conveyance in 1802, there was no consideration to support it; and that such presumption would be not only violent, but against the solemn deed of the parties. That the evidence was improper and ought not to have been received, in as much as it goes to establish a parol agreement in express contradiction of the solemn deed of the parties; for if any meaning is to be given to the words, "be the same more or less," in the deed of 1802, the Plaintiff had at that time sold and absolutely conveyed all the lands which he held under his conveyance from Hall, and that therefore there was nothing for the agreement to operate upon.

(289) For the Plaintiff, it was urged that there was no necessity for resorting to the presumption, that the agreement proved, subsisted between the parties at the time of the execution of the conveyance in 1802, or go in search of a consideration to support it, in as much as the promises were mutual and each a consideration for the other. That the number of acres in the tract was quite uncertain, and for aught that the plaintiff knew, might have been less than the number expressed in the deed: his promise therefore to pay the Defendant in that event ten dollars for every acre so falling short, was a good consideration to support the promise of the Defendant, to enforce which the action was brought. This agreement is not in contradiction of the deed, but perfectly consistent with it; it was quite a distinct transaction and not intended to control, explain or vary the deed in any respect, but stood entirely on its own bottom.

BY THE COURT—Here are mutual promises; one is made the consideration of the other, and we are of opinion that

the Plaintiff's promise to refund in the event of a deficiency in the number of acres, is a good consideration to support the Defendant's promise to pay, should there be more acres than called for by his deed. Judgment for the Plaintiff.

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(290) TINDALL'S EXECUTORS *v.* MOUNGER *et al.*

From Rowan.

A. gives his bond to make title to a tract of land to B, and dies intestate, leaving three sons, his heirs at law, one of age, the other two infants. B. dies; the administrators of A. recover of the executor of B. a judgment for the balance of the purchase money for the land. The executors and devisees of B. file a bill, praying for a specific execution of the contract, as against A's heirs at law, and an injunction as against A's administrators, on the ground that part of the land was claimed by an elder title. The heirs, in their answer, declare their readiness to make title, and the administrators admit assets. Injunction dissolved, upon Defendants' giving security to make title agreeably to the prayer of the bill; and the costs ordered to be paid by A's administrators, out of the assets of their intestate.

Henry Mounger, by his bond dated 1st January, 1784, bound himself, his heirs, executors and administrators, in a penalty, conditioned to make to Jas. Tindall, his heirs and assigns, a good and clear right and title in fee simple, to three tracts of land, as soon as rights could be obtained. The land had been entered by Mounger, and the grants afterwards issued and came to the hands of Tindall. In February, 1795, Mounger died intestate, leaving three sons, Edwin of full age, Thomas and Henry infants. Thomas afterwards arrived to full age. In May, 1795, Tindall died. Afterwards the administrators of Mounger recovered a judgment upon a bond given by Tindall for the balance of the purchase money of the land; and thereupon, in February, 1797, a bill was filed by the executors and devisees of Tindall, against Mounger's heirs aforesaid, and also against David Cowan, a person who claimed two of the tracts sold as above, by an elder title, to carry into specific execution the contract of sale appearing in the bond aforesaid; and for an injunction against the judgment at law, on account of a claim of Cowan. The Defendants put in their answers, and admitted the bond

for title, and Thomas and Edwin, who were now of
(291) age said they were ready to make titles; the infant
Henry, submitted to act as the Court should direct. The administrators admitted the estate of their intestate, Henry Mounger, deceased, was solvent. On these answers, the Court, at September term, 1799, ordered the injunction to be dissolved, on bond and security to amount of the judgment being given to make title agreeably to the prayer of the bill. The case coming on to be heard on the bill and answers, it was referred to this Court to decide which of the parties to this suit should pay the costs.

BY THE COURT—We are of opinion that the costs should be paid by Mounger's administrators, out of the assets of their intestate.

SEARS *et al. v.* WEST.

From Craven.

A billiard table erected and used merely for the purpose of amusement, is liable to the tax imposed on "billiard tables," in the same way as if used for the purpose of gaming.

This was an action of trespass, to recover damages from the Defendant for having taken out of the possession of the Plaintiffs a billiard table. The Plaintiffs were the owners of the table, which previous to the first day of April, 1807, they caused to be erected in the town of Newbern at their own expense; not for any purpose of emolument, or to be employed as a gaming table, but for their private and individual amusement. They had constantly kept up the table since its erection, for the purpose which originally induced them to have it built. The Defendant, being Sheriff of Craven county, levied on the table for the tax which he conceived was due therefor to the State, for the year
(292) 1807. If the tax be due thereon, and the levy therefore legal, it was agreed that judgment should be entered for the Defendant: if otherwise, for the Plaintiffs, and damages to be assessed to six pence.

Gaston, for the Plaintiffs, contended, that the act of 1804, ch. 31, permitting the use of billiard tables, and imposing a

tax on them, related only to such tables as were *erected* and *used* for the purposes of *gaming:* that the act of 1798, ch. 19, "for the prevention of vice and immorality, by suppressing excessive gaming," prohibited the use of all "gaming tables." The act of 1804, ch. 31, tolerated the use of billiard tables "for the purposes of gaming," and imposed a tax on them. As the object of the first act was to suppress gaming, and of the latter to tolerate gaming on billiard tables, it cannot be supposed that a table erected merely for the purposes of amusement, and not of gaming, came within the purview of the act. Such construction ought to be put upon a statute as may best answer the intention which the makers had in view—*Plow.* 232—11 *Rep.* 73. This intention is sometimes to be collected from the cause or necessity of making the statute: at other times from other circumstances. Whenever this can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute—*Plow.* 205. A thing within the letter of a statute, is not within the statute, unless it be within the intention of its makers.

BY THE COURT—The object of the act of 1798, ch. 19, was to suppress excessive gaming, and also to remove the temptations to "idleness and dissipation," as these contributed to the main vice. The act therefore forbids the use of "gaming tables," generally, with a proviso, that it should not extend to billiard tables until the 1st day of April, ensuing. The act of 1804, ch. 31, tolerates the use of
(293) billiard tables, but imposes a tax upon that use. By that act, every man who "*erects and keeps*" a billiard table, is made liable to the tax. The Legislature seems to have considered the use of the billiard table as conducive to idleness and dissipation, as well as a mean by which excessive gaming was promoted. We are therefore of opinion that judgment should be entered for the Defendant.

JOHNSTON, Assignee, &c. *v.* KNIGHT.

From Richmond.

A. and B. gave their joint bond to C., and D. became the subscribing witness. C. assigned the bond to D., who brought suit on the bond, against A. He pleaded the general issue, and upon the trial, the hand-writing of D. and also of A. was proved. It was also proved, that on the day on which the bond bore date, A. had purchased goods of C. to the precise amount of the bond. This is not legal proof of the execution of the bond; and the Jury having found a verdict for the Plaintiff, the verdict was set aside, and a nonsuit entered, upon the ground that the testimony was improperly received; and also upon the ground, that the production of the subscribing witness to a bond is never dispensed with, except from necessity: as where he is dead, has removed, or become interested by operation of Law. Here the subscribing witness has become the assignee of the bond, and the Plaintiff in the cause.

Moses Knight and Richard Knight executed their joint bond to John Hardwick, executor of the last will of Richard Edgeworth, deceased, and William Johnston, the Plaintiff in this cause, became the subscribing witness to the said bond. Hardwick afterwards assigned the bond to Johnston, and Johnston brought an action of debt against Moses Knight, one of the obligors. The Defendant pleaded the general issue. Upon the trial of the cause, the hand-writing of Johnston, and also of Moses Knight, was proved. It also appeared
(294) in evidence, from the account of sales of Richard Edgeworth's estate, returned into the proper office by his executor, John Hardwick, that Moses Knight purchased at the sale of Richard Edgeworth's estate, goods to the precise amount of the bond, and that the sale was made on the day on which the bond purported to be executed. The assignment of the bond to Johnston was also proved. The Jury found a verdict for the Plaintiff, subject to the opinion of the Court upon the question, "Whether the execution of the bond was legally proved?"

HENDERSON, *Judge*, delivered the opinion of the Court:

It is one of the primary rules of evidence, that the best which the nature of the case admits of, and which is in the party's power or possession, shall be produced. The offer of lesser evidence whilst the greater is in the power or possession of the person offering it, affords a presumption that the greater evidence, if produced, would operate against him. The testimony of the subscribing witness to a written contract, is the best evidence of its execution, of the terms, con-

ditions and consideration, on which it was made. He is selected by the parties to bear evidence of their contract in case a dispute should arise. His production has been dispensed with in cases of necessity only; as where he is dead, removed beyond the process of the Court, become infamous, or interested by operation of Law. The necessity in the present case arises entirely from the act of the person, (or at least with his concurrence) who offers the lesser evidence, which certainly cannot and should not form an exception to the general rule. We are therefore of opinion, that the evidence received upon the trial was improperly received, that the execution of the bond was not legally proved, that the verdict should be set aside, and a nonsuit entered.

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(295)

PARKER'S EXECUTOR *v.* PARKER'S ADMINISTRATOR.

From Halifax.

A suit pending in Chancery is "by consent of parties" referred to five persons, whose report is to be binding between the parties. The referees make a report, and exceptions are filed to it, charging errors and mistakes in liquidating the accounts. The suit then abates by the death of the complainant. An action on the case was brought to recover the sum reported by the referee to be due. The record of this suit, and the proceedings therein, are not evidence of the debt. The reference being matter of record, the award is not binding, until confirmed by the Court.

In 1799, Airland Parker filed his bill in Chancery, in Sussex County Court, in Virginia against Richard Parker, executor of the last will of Frederick Parker, deceased, praying for a discovery and an account, &c. To this bill Richard Parker put in his answer, and at September term, 1801, the following entry was made in the cause: "By consent of parties, this cause is referred to William Hines, Robert Goodwyn, Benjamin Tate, John Chappell and James C. Baily, or any three, whose report to be binding between the parties." At March term, 1802, the referees made their report, and therein stated that they found the Complainant Airland Parker, was indebted to the Defendant Richard Parker, executor, &c. in the sum £135, 18*s.* 9*d.* Virginia currency; which sum, except £28 thereof, they were of opinion should bear

interest from 6th October, 1795, till payment should be made. The cause was continued at Complainant's costs, and at June term following, the Complainant filed several exceptions to the report of the referees, charging them with errors and mistakes, in liquidating and settling the accounts of Richard Parker, executor as aforesaid. The cause was then continued, and at each successive term was continued without any further proceedings being had therein, until June term, 1803, when it abated by the death of the Complainant.

(296) This was an action on the case brought on the above award. The only evidence offered by the Plaintiff, was a copy of the record from the Court of Chancery, for Sussex County in Virginia, setting forth the proceedings in that Court as above stated. The Jury found a verdict for the Plaintiff, subject to the opinion of the Court, upon the question, "whether the action would lie upon the award?" The case being sent to this Court,

HALL, *Judge*, observed that although he entertained much doubt upon the question, he inclined to the opinion that judgment should be entered for the Plaintiff; that if the reference in this case had been made as references generally are made, to clerks and masters, or if it had been the understanding of the parties, and the practice of the Court in which this reference was made, that reports made by referees appointed as in this case, should be subject to the exceptions of either party, as reports made by clerks and masters are, it was clear that judgment should be entered for the Defendant. We can however only judge from the record itself. It is therein stated that, "by consent of parties, the case was referred to William Hines and others, whose report was to be binding between the parties." It seemed very much to resemble common cases of submissions and awards; the Defendant was not precluded on the trial from availing himself of any valid objection against the report or award, that was in his power to be made, and which it would be proper to make to awards in ordinary cases; but he seemed to have waived this privilege, and to rest his defence on the ground that it was only an interlocutory decree, and not such a submission and award as would support this action. But by

LOCKE, LOWRIE, HENDERSON, and WRIGHT, *Judges*. The order of reference appears to us to have been made by the Court; the report or award is therefore no evidence of a

debt, or obligatory upon the parties, until confirmed by the Court. Judgment for the Defendant.

(297) ARRINGTON *v.* CULPEPPER.

A. and B. signed a written contract respecting a horse-race, agreeably to the act of 1800, ch. 21. B. and C. made a by-bet, and reduced it to writing, and therein B. agrees, "if A. should win the race which he had made with him that day, he agrees to pay C. one thousand dollars." A. won the race, and the stakeholder was directed by B. to deliver his bond for the $1000 to C, and the bond was delivered. C. sued B, and B. pleaded that the bond was delivered as an *escrow*. Ruled,

1. That the written contract of by-bet between B. and C, not referring to the written contract between A. and B. as to the race, there was not between B. and C, such a contract in writing, as the 2d section of the act of 1800, ch. 21, requires.
2. That parol evidence could not be admitted, to prove that the race referred to in the written contract of by-bet, was the race mentioned in the written contract between A. and B.
3. That the delivery of the bond to C. by the stakeholder, by the direction of B. did not preclude B. from claiming the benefit of the act of 1800; and requiring C. to prove every thing required by that act to make the bond obligatory.

This was an action of debt, to recover a by-bet on a horse-race. The Jury found a verdict for the Plaintiff, subject to the opinion of the Court upon the following case. The Defendant, Matthew Culpepper, and one Francis Ward, on the 30th day of November, 1805, made a horse-race, and on the same day entered into the following articles:

"Articles of a race made this 30th November, 1805, between Mathew Culpepper and Francis Ward, as follows, (to-wit,) They are to run at Douther's paths, on the Monday before next Christmas, for two hundred dollars, for which they have staked their notes. Culpepper is to run a two year old filly of his, called Dolly Washington, being a sorrel which he had of Abner Foster. Ward is to run a sorrel colt of his, called Golden Rod, which was got by Don Galo, and raised by Mr. William Avent, of the same age, both being considered two years old last spring. They are to run one quarter of a mile; to start at the end towards the old house, and to run out towards the road. The lowest nag is to carry one hundred and thirty-six: the other is to carry fourteen pounds for the first inch, and seven for every other inch over, or in proportion
(298) for parts, &c. They both agree, that either two of the judges, on the day of the race, shall measure the ground, and whatever they say is a quarter of a mile, shall be binding on both parties. They also both agree that the race shall be what is called "a play or pay"

race. In evidence of which agreement they have both set their hands and seals, the date above mentioned.

"MATHEW CULPEPPER, (Seal.)
"FRANCIS WARD, (Seal.)

"Witness, ABNER H. HINES."

On the same day, the Defendant signed and sealed the obligation declared on, which was in the following words and figures, to wit:

"If Francis Ward wins the race that he and myself made this day, I promise to pay to Peter Arrington the just sum of one thousand dollars, on or before the 25th day of December next, as witness my hand and seal, this 30th day of November, 1805.

"MATHEW CULPEPPER, (Seal.)

"Teste, ABNER H. HINES."

This obligation was delivered to a third person, as a stakeholder, to be delivered over to the Plaintiff, in case he won the bet. The race between Ward and defendant was run agreeably to the articles, and Ward declared to be the winner. Afterwards, and on the same day, the stakeholder was directed by the Defendant to deliver over the obligation to the Plaintiff, saying, "he would have won the race, if his rider had rode agreeably to his directions," and the stakeholder delivered the bond accordingly.

It was submitted to the Court, 1st. Whether the Plaintiff, on the production of the articles aforesaid, and proof of their execution, should not be permitted to read the same in evidence, as proof of the terms of the race bet upon by Plaintiff and Defendant? 2d. Was it essential to the Plaintiff's right to recover, that he should prove any thing relative to the articles, the running and winning of the said race, after the delivery by the stakeholder to the Plaintiff, by the direction of the Defendant? And 3d. Whether, if further proof was necessary on the part of the Plaintiff, he should be
(299) permitted to shew by *parol* evidence, that the articles before set forth, were the articles of the race referred to by the writing obligatory declared on? The case was sent to this Court for the opinion of the Judges.

LOCKE and HENDERSON, Judges, were of opinion that the Plaintiff was entitled to judgment. But by

HALL, LOWRIE and WRIGHT, Judges—The act of 1800, ch. 21, declares, in the first section, "that from and after the passing of this act, no money shall be recovered at Law, by means of any bet or wager on a horse-race, except a written obligation is produced on the trial, containing the sum so

betted or laid on such horse-race, signed, sealed, and attested by at least one witness." This part of the act has been complied with by the Plaintiff, by the production of the written obligation upon the trial, a copy of which makes a part of the present case. The second section declares, "that all horse-racing contracts shall be reduced to writing, and signed by the parties thereto at the time they are made, otherwise they shall be void: and all sub contracts or by-bets on the same shall also be reduced to writing, and signed by the parties to such by-bets, or the same shall be void: and on all trials at Law, where it may be necessary to give such contracts in evidence, no parol testimony shall be admitted to alter or explain such contracts." The first and third questions may be considered together. There would be no difficulty in the case, if the obligation declared on recited the terms of the race made between the Defendant and Ward, or referred with sufficient certainty to the articles entered into by them, in which articles those terms are contained. In that case, the articles referred to would become connected with the obligation on which the suit is brought, and would be viewed in the same light as if they had been signed by the Plaintiff and
(300) Defendant. The contract between the parties, as well as the sum bet, would be evidenced by a writing signed by the parties. But the obligation merely refers to a "race made," without saying whether the terms of such race were reduced to writing; or existed in the memory of witnesses. In the latter case, the Plaintiff clearly could not recover. But suppose it to be otherwise, (as probably the fact was,) and the Plaintiff should be permitted to give such articles in evidence; the Defendant would be permitted to shew that he and Ward made another race on the day referred to or mentioned in the obligation declared on: it would then be a matter of controversy between the parties, to which race the obligation referred, and that controversy could only be settled by the introduction of parol testimony. The Legislature did not intend that horse-racing contracts should in any respect depend upon testimony of that kind, further than to prove the execution of the writings in which they were contained; nor would such testimony in the present case be necessary, if the obligation sued on had either recited the terms of the race, or referred with sufficient certainty to any instrument or writing in which they were contained. The act is express, that all such sub-contracts or by-bets shall

be reduced to writing, and signed by the parties, or the same shall be void. That has not been done in the present case: the writing signed by Ward and Culpepper has not been signed by Arrington and Culpepper. It is true that this is not strictly required, but it ought to be referred to by the obligation sued on, with so much certainty as to preclude the necessity of producing parol testimony to connect them. This case must be viewed as if the articles had not been signed by Ward and Culpepper, but by Ward and some other person; because, although the Defendant and Ward signed them, yet on the same day, they might have made another race, and signed other articles, in which case it would be uncertain to which race the Plaintiff and Defendant re-
(301) ferred. As the Plaintiff has been fortunate in this race, he is willing to admit that those were the articles, and thinks the Defendant should be compelled to do the same because he signed them. But the Plaintiff would not deem this reasoning very applicable, if he had lost the race and were Defendant in this suit.

As to the second question, it is in substance this, whether the plaintiff is in any better situation in consequence of the Defendant having directed the stakeholder to deliver the obligation to him, after losing the race, than he would be in, provided he had proved by witnesses that he won the race, and that in consequence thereof, the stakeholder had delivered the obligation to him? If such direction by the defendant was to have the effect of making the obligation which had been delivered as an *escrow*, stand as one delivered by the Defendant to the Plaintiff, and not to be considered as having been delivered as an *escrow* at all, it would be all-important to the Plaintiff. But that cannot be done. The Defendant did not himself deliver the bond to the Plaintiff; (but if he had, it would not alter the case;) he only directed the stakeholder to do it. The effect then can be no other than if proof tantamount thereto had been adduced. The Defendant's confessions out of Court, place things precisely where they would be, if the facts confessed had been proved in Court. They amount to this, that he lost the race with Ward, that that was the race referred to in his obligation; but that the contract which he made with the Plaintiff was defective in point of Law, of which defect he claimed the benefit. We are therefore of opinion, that the contract has not been entered into agreeably to the directions of the act

of Assembly, and that judgment should be entered for the Defendant.

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(302) MOORE *v.* EAGLES.

From New Hanover.

A. and B. being tenants in common of a tract of land, situate in an island in the Cape Fear river, agree by deed, "that as to those lands, on the said island which lie below the causeway or great road through the island, A's two-thirds shall be taken all together, and shall begin at the lower end of the said island, and be bounded by the North-West River on the one side, and by the North-East River and Great Creek on the other; and B's one-third shall be taken off of the remainder, lying above the said A's and below the said causeway; and as to all that part of the island belonging to them, lying above the said causeway, A's two thirds shall be taken next the thoroughfare and North-East River, and the said B's one-third shall be taken next the causeway." This agreement is sufficiently certain for each tenant to know his share, and dissolves the tenancy in common.

This was a petition filed in the County Court of Brunswick, for partition of certain lands, lying in Eagles' Island, in the river Cape Fear. The petition stated that Joseph Eagles, late of the county of Brunswick, who departed this life in the year 1791, was at the time of his death, seised and possessed in fee simple of a certain estate and tract of land, situate, lying and being in Eagles' Island aforesaid; that he died intestate and the land aforesaid, by the then Laws of descent in this state, descended upon his issue male, in equal portions as tenants in common; and that the said Joseph left issue, male, two sons, Richard and Joseph. That in the year 1806, the said Richard and Joseph being still tenants in common of the land aforesaid, the petitioner Maurice Moore purchased out all the said Richard's right, title, interest, claim or demand whatever in said land, who by deed bearing date in the same year, conveyed the same to the petitioner, who thereby became a tenant in common with the said Joseph. And to the end that a severance might be made of the said tenancy in common, in the land aforesaid, between the
(303) said Joseph and the petitioner, and that each might know and have his part distinct and separate from the other, the petitioner prayed the Court to appoint commissioners to lay off and divide the said land between him and the said Joseph.

To this petition, the Defendant (who was an infant), by

his Guardian, put in a plea, setting forth, that Richard Eagles, the elder, was seised and possessed of certain lands, situate in Eagles's island aforesaid, and by his last will and testament, dated the 23d day of March, in the year 1769, and which had been duly proved, devised two-thirds of his lands upon said island, to his son, Joseph Eagles, in the petition mentioned, in fee, and the other third to his daughter, Susannah Elizabeth Eagles, in fee: That the said Susannah Elizabeth intermarried with Alfred Moore, Esquire; and they by deed bearing date the ____ day of____ in the year ____ conveyed the third part of said lands, devised to the said Susannah Elizabeth as aforesaid, to Maurice Moore, Esquire, who, by deed reconveyed the same lands to the said Alfred Moore. That Joseph Eagles, named in the petition, departed this life as set forth in the petition and that his share in the said lands, to-wit, two-third parts thereof, descended to his sons Richard and the Defendant Joseph Admitting that the petitioner purcha-ed of Richard, as set forth in the petition, the Defendant stated, that he was advised, the lands aforesaid devised to the said Joseph Eagles and Susannah Elizabeth Eagles, were held by and belong to the said Alfred Moore, Maurice Moore and the Defendant, as tenants in common, and that no division of said lands could take place according to the laws of this State, by virtue of any petition filed for that purpose, unless the said Alfred Moore was made a party to the petition—That no severance of said tenancy in common or partition of said lands, had been made among or between the parties claiming said lands or shares therein, under the last will and testament of the said Richard Eagles, the elder; and that the said lands then remained to be divided between the said Alfred
(304) Moore, Maurice Moore and the Defendant, as tenants in common. That Alfred Moore was not named in the petition either as a petitioner or Defendant, nor was any division of said lands sought, as related to the interest of said Alfred Moore therein; and Defendant demanded the judgment of the Court, whether he should be compelled to make any other or further answer to the petition, until the said Alfred Moore should become a party to the petition.

To this plea of the Defendant, the petitioner filed a replication, stating that his petition was sufficient in Law to be answered unto by the Defendant, without the said Alfred Moore being made a party to the same; because he averred,

that long before he filed his petition, to-wit, on the twenty-eighth day of January, in the year 1788, Joseph Eagles, father of the Defendant, then being proprietor of two-thirds, and the said Alfred Moore of one-third, as tenants in common of the said lands, did, by a deed indented and bearing date the day and year aforesaid, make partition of the said lands, and did thereby dissolve the said tenancy in common, as by the said deed would more fully appear.

The deed, referred to in the replication, was in the following words, to-wit:

"Whereas Richard Eagles, formerly of Brunswick County, Gentleman, in and by his last will and testament, devised his lands on the green island opposite Wilmington, commonly called Eagles Island, to be divided between his son, Joseph Eagles, party to these presents, and Susannah Eagles, (now Susannah Moore,) his daughter, in the proportion of two-thirds to his said son Joseph Eagles, and one-third to his daughter Susannah; and whereas the division hath never been made: This Indenture therefore witnesseth, that the said Joseph, on the one part, and Alfred Moore, husband of the said Susannah, on the other part, have agreed, and by these presents do agree, that the lands shall be divided in the following manner, that is to say, that as to all those lands on the said island which belonged to the said Richard Eagles at his death, and which lie below the causeway or great road through the said island, the said Joseph's two-thirds shall be taken all together, and shall begin at the lower end of the said island, and be bounded by the North-
(305) West River on the one side, and by the North-East River and Great Creek on the other; and the said Susannah's third shall be taken off of the remainder, lying above the said Joseph's and below the said causeway; and as to all that part of the said island belonging to them as aforesaid, and lying above the said causeway, the said Joseph's two-thirds shall be taken next the thoroughfare and North-East River, and the said Susannah's part, or the other third, shall be taken next the causeway. If any lots immediately opposite to Wilmington shall be found still belonging to them, they shall hereafter be divided as they may agree.

A. MOORE. [SEAL.]
JO. EAGLES. [SEAL]

Signed, sealed and delivered, this 28th January, 1788, in the presence of
JOHN SWANN,
JAMES READ."

To this replication the Defendant demurred, and the Plaintiff having joined in demurrer, the case was sent to this Court for the opinion of the Judges; and was argued by *Jocelyn*, in support of the demurrer, and by *A. Moore*, against it. The arguments advanced in support of the demurrer, are relied upon by LOCKE, Judge, and noticed in the opinion delivered by him in this case.

A. Moore, against the demurrer. It is insisted that the deed set forth in the replication, is only an agreement and

not a partition. To this it may be answered, that every deed must contain an agreement, and the question on this point is simply this, "does the deed in question contain such substance and such legal form, as to produce those legal effects intended by the parties?" Tenants in common have *several* estates, totally independent of each other. A partition therefore cannot be effected by either of the commoners conveying any estate to the other. For if he convey his own estate, then the grantee owns the whole in severalty. That a tenant in common, any more than another person, cannot convey to a grantee what belonged to the grantee before, is certain: Nothing can be more against reason than such an attempt, and accordingly it is a maxim, "that what is once mine cannot be more mine."

There are several ways by which commoners may
(306) make partition; among others is that by deed. What must such deed contain to effect the purpose of the parties? Not a conveyance of any estate; and if not, then it can contain nothing else but an agreement, fixing the lines of separation. Should that be manifest by the words used to express the meaning of the parties, every thing necessary has been done. With respect to fixing the lines, if there ever was a case where certainty could be arrived at, this is surely such a one: because the parties are to set off at two opposite points; one is a great causeway and main road, the other is at the junction of two great rivers. They are then to approach, one party taking two-thirds, the other one-third, until they meet at a place so described as that it cannot be mistaken, for it must form a line exactly parallel with the great causeway.

It will be observed, that the partition, if made at all, is made by the deed. So soon, therefore, as that deed was duly executed, the business was done; nothing posterior could alter its nature, either to amend it or to make it worse. Had the parties gone a year afterwards and marked a line, this act would not have made the partition: the deed had done that before. All that the line could effect, would have been to bind the parties to it, and prevent any measuring or further trouble. If this reasoning be unsound, we can no longer say that partition can be made by deed; for no deed ever did or ever can contain a line; it can only describe, and the precision with which that description shall be made, must ever depend on circumstances. It is a part of the Law on this

subject, that commoners may make partition of lands which lie in other counties, that is, at a distance, and where it is physically impossible that anything more can be done than to describe where the boundaries shall be, which the parties understand, and are able to make others understand. That is certain, which can be made so, is a maxim in our Law, and governs this case, as well as many others. But it is
(307) said, that this deed meant that the land should be divided by *value* and not by measure. To this it is answered, that the deed says nothing about value, and this is but an inference made by the opposite counsel. There is no principal of Law better ascertained than this, that the Judges must construe every agreement in writing so as to carry the intention of the parties into effect; and it is found that the Judges have pressed the English language hard to carry that principle of Law, reason, justice, and liberty too, into effect. It is said, the words about value, though left out, ought to be understood; and why? To make two men tenants in common, who declare by their deed, it is the thing they intended to destroy. Two men agree to alter their condition as tenants in common, and expressly say in the deed, that they mean to be tenants in common; yet in construing their deed, we will undertake to say the parties have omitted certain words, and although they intend to make partition, yet they have not done it. It is alleged, that the deed only contains an agreement to make partition at some future time, because it declares that the land *shall be so and so divided.* But the parties do clearly set forth, that they do not choose to continue tenants in common any longer; why then postpone the severance? They took all the trouble to effect their purpose that the case required. It cannot be believed, that Judges will seize on such a criticism to overturn the honest, fair, and useful purposes of the parties. But in truth it is technically proper; because, at the time those words were expressed, the act was incomplete, and something in future was to be done: the parties were to sign, seal and deliver the agreement to each other; and this manner of expression will be found in national treaties, and in a variety of other writings on the most interesting subjects. Under this deed, it was clearly understood where the two-thirds of Eagles lay, as well as the one-third of Moore: the tenancy in common
(308) must then have been dissolved; for tenants in common are so united in possession, that neither can

know which part belongs to one or the other; the moment that point is settled, the tenancy in common is dissolved.

LOCKE, Judge.—I regret very much on this question, I should differ in opinion from my brethren, who have overruled this demurrer. But as it is my duty to be guided by the best judgment I can form on this subject, and not by the opinion of others, I shall briefly state the grounds on which my opinion is formed. The deed set forth in the replication of the petitioner, does not state either the beginning, the courses, or the lines of Moore's one-third, but only on what part of the island it shall be laid off. It does not state whether his share shall consist of one-third in quantity or of one-third in value; it declares that one-third (meaning certainly whatever share was devised to Mrs. Moore,) should be laid off in a certain part of the island. I have always understood a tenant in severalty, to be one whose estate is severed and separated from that of all others and who completely knoweth his own land. I would then ask, can any man, from this deed, know precisely Moore's one-third? But it is said, "that is certain, which can be made so," and that as this deed says, Moore's share shall be taken off adjoining the causeway, any surveyor can ascertain where the share will be, and that to effect a partition, it is not necessary to have a survey and marked lines. To this I answer, that unless the deed of partition should state some point at which the beginning shall be, some courses to be run by a surveyor, or some natural boundary, which can with certainty be ascertained, the partition cannot be so made as to leave an estate in severalty, to one of two tenants in common. I am not able, from the description of this deed, to say that any such certainty is contained therein, or that by any possibility it can be made certain. For I think one third of this tract (309) can be laid off, so as to answer the description of this deed, in as many different ways as the fancy of twenty surveyors might suggest. If surveyed by one to day, from the face of the deed, he would give land to Mr. Moore, which another on to-morrow would take from him, and thus the land would be Moore's or Eagles', according to chance, or the caprice of a surveyor. It has been further said, that the land just below the causeway, is certainly Moore's, and if he can place his foot on a single spot, and say it is his, that is evidence of a partition. I admit that it is as to that spot, but not

as to the whole third; and if Moore be a tenant in common of a single acre, although as to the rest he may be a tenant in severalty, yet this demurrer ought to be sustained, and Moore made a party. It is further urged, that if this demurrer be sustained, and commissioners be appointed under our act of Assembly, to make partition, this deed will not restrain them from laying off Moore's third where they please, and that the Court cannot impose terms which the commissioners are bound to pursue. I admit, that if such an order should be made by the Court, and commissioners appointed under it, such a consequence might ensue. But I think no such order can or ought to be made. I am far from viewing this deed as a mere nullity; I consider it as a covenant binding Eagles and his heirs, and all claiming under him, to divide according to the spirit of this instrument, and that this is a case where the Common Law remedy cannot be used; that when Moore is made a party, he has nothing to do, but to plead this deed, in order to oust the Law Court of its jurisdiction, and compel the petitioner to resort to a Court of Equity, which will decree partition to be made according to the deed. For the act of Assembly affords a remedy, only where there is neither a partition nor a covenant to divide in any particular manner; leaving the commissioners with full powers to divide equally between the parties, and to ascertain the difference in value of the respective
(310) shares. The remedy therefore given by the statute, only extending to cases where no partition has been made, nor any agreement binding the parties to divide in a particular way, seems to me not to embrace this case, but to leave the parties to such remedy as was in force before the passing of the act. For these reasons, I am of opinion, that the demurrer ought be sustained. But,

BY HALL, LOWRIE, WRIGHT, Judges—Let the demurrer be overruled.

(311) Den on Demise of MARTIN *v.* LUCEY.

From Anson.

Sale of lands for taxes.

It is not incumbent on a purchaser of lands sold for taxes acknowledged to be due, to shew on the trial of an ejectment brought against him by the person who was bound and who failed to pay the taxes, any thing more by way of defence, than the Sheriff's deed for the lands so sold.

If such purchaser be Plaintiff in the ejectment, he must also shew that the title to the lands is out of the State.

The title being out of the State, the taxes are *a lien* upon the lands, into whosoever hands they may pass: and it behoves the present holder of the lands to see that the taxes have been paid: for

If the Sheriff, in his advertisement of sale for the taxes, mistake the name of the owner of the lands, or their local situation, the purchaser at such sale shall hold the lands.

The acts which make it the duty of the Sheriff to advertise the sale in some newspaper printed in the State, and at three public places in the county, and set forth the names of the owners of the lands, the water courses on which the lands are situate, &c., are merely directory to the Sheriff in the discharge of his duty. His neglect to observe these directions may subject him to a suit for damages at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the Sheriff.

The Sheriff's authority to sell, rests upon the fact, *that the taxes have not been paid*. If, therefore, it appear that the taxes have been paid, the purchaser at the Sheriff's sale gets nothing by his purchase.

The lessor of the Plaintiff claimed the lands described in the declaration of ejectment under a grant from the State. The Defendant alleged, that the lands had been sold by the Sheriff of Anson for the taxes due thereon, and that he had become the purchaser. He produced a deed executed to him by the Sheriff for the lands, and was ready to prove a regular advertisement of the sale, published in the public papers, but could prove no other advertisement. The sale was made before the year 1798. The case was sent to this Court upon the question, Whether the Defendant was bound to shew any other evidence of title than the Sheriff's (312) deed, it appearing by the Plaintiff's own shewing, that the title was out of the State?

This case was argued by *Duffy*, for the lessor of the Plaintiff, and by *M'Bryde* for the Defendant.

The argument chiefly relied upon by the former, was this: that the Sheriff has no authority to sell lands for the taxes due thereon, until he has advertised the sale in the manner prescribed by the acts of 1794, ch. 15, and 1796, ch. 1. The latter act declaring, in express terms, that it shall not be lawful for the Sheriff to make such sale, until he has so

advertised. It must, therefore, appear to the Court, that the Sheriff had authority to sell, before any validity can be attached to his deed: and this can be shewn in no other way, than by proving that he has done all those things which are required to be done before it shall be lawful for him to sell; that is, his having advertised the sale in some newspaper printed in this State, and also at three public places in the county in which the lands lie.

M'Bryde, for the Defendant, contended, that to give to the acts of 1794 and 1796, the construction contended for on the part of the lessor of the Plaintiff, would entirely defeat the objects of those acts and the intention of the Legislature. Those acts were intended for salutary purposes, and should receive a liberal construction. After every precaution has been taken, and the greatest exertions of Legislative prudence and foresight have been exercised, the revenue laws of the State are still evaded. They have been enacted, from time to time, to prevent very general and growing mischiefs. In the year 1792, it was found necessary to subject lands to sale for the taxes due thereon. It was well known, that large tracts of land were owned by persons resident in other States, and in many instances by foreigners. Those persons had no personal property in the counties where the lands
(313) were situate. It was therefore necessary for the Legislature either to abandon the land tax, or to adopt such measures as would enforce its payment.

The act of 1794, ch. 15, sec. 3, declares, "that if any owner of land lying in this State, or any owner of town property in this State, shall fail, by himself, agent or attorney, to give in a list of the same, in the counties in which the said lands or town lots are situated, the sheriffs of the said counties in which the same are respectively situated, shall advertise the said lands or town property, at three of the most public places within the county, and at the court house of the district wherein the lands are situated, and also in the Gazette of the State, the printer of which is hereby required to publish the same: and if no person pays the tax on the same, shall, sixty days after such advertisement, sell the said lands or town lots, or so much thereof as may be necessary to pay the said tax, with contingent charges."

The act of 1796, ch. 1, sec. 5, declares, "that from and after the passing of this act, it shall not be lawful for any of

the Sheriffs in this State, either by themselves or their deputies, to sell lands for their taxes, until the same hath been first advertised for sale in the North Carolina Journal, &c. for the space of one month, and also in the county in which they are situated, in manner as heretofore required by law; the whole of the expense attendant on which shall be chargeable on such lands, and shall be made accordingly; in which advertisements shall be mentioned, the situation of the lands, the streams near which or on which they lie, the estimated quantity, the names of the tenants in possession, if cultivated, and the name or names of the reputed owner or owners, where the same can be ascertained." It is a maxim that the Law requires impossibilities of no man, and yet it would be impossible for purchasers in general, to shew that the Sheriff has minutely attended to and exactly complied with all the directions given by these acts.

(314) It would be absurd to suppose, that before a man could safely purchase, nay before he could think of becoming a bidder, he must carefully procure certain newspapers, go on the land and see that the situation is accurately described, know the name of the stream on which the land lies, the quantity, the name of the tenant in possession, the real or supposed owner; that he must then hunt up the Sheriff's advertisements in different parts of the county, till he finds three at least, and then be able to shew that they were put up in the most public places in the county. At the time the lands in question were sold, he must have gone also to the district court house, to search for the advertisement at that place, and when all this shall be done, he may not be the purchaser: another person may overbid him, or the tax may be paid before the sale. If proof of all these particulars could be made immediately after the sale, could it be expected ten or fifteen years afterwards? If such proofs be necessary at one time, it must be equally necessary at another.

The act of 1801, ch. 13, supports the position maintained by the Defendant's counsel, and shews the understanding of the Legislature upon the subject. This act authorises a succeeding Sheriff to execute deeds for lands sold for taxes by his predecessor in office, and the following requisites only are pointed out. 1st. That the sale be *bona fide*. 2d. That satisfactory proof be made to the County Court, that the claimant purchased and paid the purchase money. 3d. That the

claimant has duly paid the taxes since the sale; and 4th. That the plat be registered. This last point being in conformity with the act of 1798, makes no part of the present case. Upon these proofs being made, the County Court are directed to order the Sheriff to convey the lands so sold. Here the Legislature does not direct the County Court to make any enquiries how the Sheriff conducted the sale? whether he complied with all the directions of the (315) acts of Assembly relative to advertising of the sale, &c.? Yet they would have imposed this inquiry upon the County Court, had they thought a conveyance illegal or insufficient without a strict compliance with such requisites.

The Sheriff being a public officer, the Court will presume that he has done his duty in all respects, otherwise we throw insurmountable obstacles in the way: we require proof of points which are only *directory* to the Sheriff, and which merely point out the *mode* in which he should conduct his sales. The advertisements, and the manner of advertising, were not intended to give the delinquent owner of lands a further notice than the Law had already given to him: they were intended for public benefit, that bidders might know when and where to attend sales, and what lands were to be sold. The Sheriff does not derive his *authority to sell* from his observing the directions of the acts of Assembly: his authority arises from the failure of the owner of the lands to pay the taxes due thereon. The mode in which a Sheriff conducts his sales of land, is in general immaterial to a stranger, who becomes a fair and honest purchaser. If he be guilty of misconduct, he and his sureties are answerable to the party injured. The revenue laws of every country must be strict; they must be fully and faithfully executed, even if they should produce occasional hardship and inconvenience, otherwise they will never answer the purposes for which they were intended. It is admitted, that if the sale be fraudulent, and the purchaser be a party to the fraud, the sale is void, and nothing passes by the Sheriff's deed. It is also admitted, that if the taxes be paid, the sale of the land is void, although the purchaser be ignorant of such payment. For if the taxes are paid, the Sheriff has no authority to sell the lands. He derives his authority to sell from the failure to pay the taxes.

WRIGHT, *Judge*, delivered the opinion of the Court.
(316) The question which is presented to the consideration of the Court by this case is, whether it is incumbent on a purchaser of land sold for taxes, acknowledged to have been due at the time of sale, to shew on the trial of an action of ejectment, brought against him by the person who was bound and had failed to make payment of such taxes, anything more than the sheriff's conveyance for the land so sold. The determination of this question must depend upon a proper construction of the several acts of Assembly, authorising the sale of land for taxes, and the principles which have influenced decisions in analogous cases. The first act which made lands liable to be sold for the payment of taxes, was passed in the year 1792, ch. 2. The fifth section of this act, after authorising the Sheriff to distrain the land of any person failing to make payment of their public taxes, to sell the same, and make a conveyance to the purchaser, declares, "that such conveyance shall be good and valid in Law, the land so sold being first advertised for such length of time as is required in cases of execution." And the sixth section of the same act declares, "that if any person liable for the payment of any taxes on land, shall, before they are paid, sell the same and remove out of the county where the land is situated, the person purchasing the land shall be subject to the payment of the taxes due thereon, and shall be proceeded against, as if he had originally given in the same." From these sections it may be fairly deduced, that the Legislature intended that a failure on the part of any person bound for the payment of the taxes, due on any lands, should operate as a lien on such lands, and that the sale which should be made by the Sheriff in consequence of such failure, should convey to the purchaser a good title to the lands against the delinquent, and all persons claiming under him, notwithstanding the Sheriff should fail in making the advertisements required to be made, or in the performance of any duty enjoined on him by the act. But it is said that the act
(317) of 1796, ch. 1, sec. 5, under which the sale was made in the present case, contains express negative words; "that it shall not be lawful for any of the Sheriffs in this state, either by themselves or deputies, to sell lands for their taxes until the same hath been first advertised for sale in the North Carolina Journal, the State Gazette, or the Fayetteville Minerva, for the space of one month, and also in the

county in which they are situated, in manner as heretofore required by law; which advertisements shall mention the situation of the lands, the streams near which they lie, the estimated quantity, the names of the tenants, the reputed owners, &c." And that these words are equivalent to saying, that a sale otherwise made is not a legal sale, and consequently a conveyance under such sale cannot transfer any title to the purchaser. It is believed that this act was intended to impose additional duties on the Sheriffs, and that the provisions of this, as well as the other act, are merely directory to them of their duty; and that although a failure in the performance of any part of it might subject them to an action, in which they would be compelled to indemnify the owner of any land which might be irregularly sold, to the extent of the injury received by such sale, yet that it ought not to destroy the title of the purchaser, who has a right to presume that a public officer known to possess the power to sell, has taken every previous step required of him by the Law, under which he sells. This construction appears to be in conformity with the decisions in cases of sales made of land by Sheriffs under writs of execution, which are analogous in principle to the cases of sales for the payment of taxes. The act under which the Sheriff's authority to sell is derived in cases of execution, contains negative words. The 29th section of the act of 1777, ch. 2, after directing in what cases, and in what manner executions shall be issued against lands and tenements, declares, "that where any Sheriff shall have levied process upon any lands and tenements in manner aforesaid, and judgment shall have been thereupon had, he shall not proceed to sell the same, until in the most public place in his bailiwick, he shall, forty days at least before the day of sale, have advertised the same." (318) These words are of equal import to those contained in the act of 1796, in as much as they declare, that the Sheriff shall not sell, without first advertising. Yet in the cases of sales of land under executions, the purchasers have never been considered as bound to support their titles by proof, either of the advertisement of the Sheriff, or that the Defendants in execution had no goods and chattels on which a levy could be made; but are only bound to prove by the judgment and execution, the authority of the Sheriff to sell. The same principle that would require proof of the advertisement, would require proof that it was made in the manner pre-

scribed by the act, that is, in some one of the papers mentioned in the act, in which shall be stated all the circumstances enumerated. This would so embarrass sales of this kind, and throw so many difficulties in the way of persons willing to bid a fair price for the land, that they would not be willing to purchase. For it would not only be necessary to prove these facts on any particular occasion, but they must preserve the evidences of them, with their titles, to be used at any distant period, whenever these titles might be made the subject of controversy. The consequences would be that not only the difficulty of collecting the public revenue would be increased, but the lands would become a subject of speculation merely, to those who would, by purchasing at very reduced prices, be willing to encounter the inconveniences and risques of purchasing under these embarrassing circumstances. Let judgment be entered for the Defendant.

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(319) WILKIE AND WIFE *v.* WEST.

From Hillsborough.

Under the act of 1741, ch. 14, sec. 10, a *married* woman can upon oath accuse a man of being the father of a child begotten of her body previous to her marriage; and the man so accused shall be adjudged the reputed father, and stand charged with the maintenance of such child, as the County Court shall direct.

Catherine Jones was delivered of two base-begotten children, and several years afterwards she intermarried with Wilkie. Soon after her intermarriage, she upon oath charged West with being the father of said children. West was arrested and bound over to the County Court, and application was made to the Court for an allowance for the maintenance of the children. The Court made an order for an allowance, from which West appealed to the Superior Court; and the case was sent to this Court, upon the question, Whether under the act of 1741, ch. 14, sec. 10, relating to bastardy, *a married* woman can upon oath accuse a man of being the father of a child begotten of her body previous to her marriage, so that the man so accused shall be adjudged the reputed father of such child, and stand charged with the maintenance of the same, as the County Court shall order?

BY THE COURT—It is true, that the act of 1741, ch. 14, regulating the proceedings in cases of bastardy, speaks of *single* women only. It authorizes any two justices of the peace, "upon their own knowledge, or information made to them, that any single woman within their county is big with child, or delivered of a child or children, to cause such woman to be brought before them, and examine her upon oath concerning the father; and if she shall refuse to declare the father, she shall pay the fines imposed by this act, and give sufficient security to keep such child or children
(320) from being chargeable to the parish, &c.; but in case such woman shall, upon oath, before the said justices, accuse any man of being the father of a bastard child or children, begotten of her body, such person so accused, shall be adjudged the reputed father of such child or children, and stand charged with the maintenance of the same, as the County Court shall order, &c." This act intended to provide for the maintenance of base-born children, and to keep the counties in which they shall be born, indemnified against their maintenance, by compelling the reputed fathers to give bonds with security for this purpose. This being the general intent of the act, the Court will give to it such construction as will effectuate this intent; which can only be done by admitting the mothers of base-born children, whether they be single or married, to accuse, upon oath, the men who are the fathers of such children, in order that process may issue, and the men so accused may be compelled to give bonds with sufficient security, for the maintenance of the children. The order of the County Court must therefore be confirmed.

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(321) VICK *et al. v.* FLOWERS.

From Chatham.

Pending an execution against A. he conveys his property to B. by a deed purporting to be absolute and for a valuable consideration; and it is agreed between A. and B. that when the execution shall be satisfied, B. shall reconvey the property to A. Equity will not enforce this agreement.

No person is entitled to the aid of a Court of Equity to enforce a contract entered into with a fraudulent intention, or for a fraudulent purpose.

Fraudulent conveyances are binding upon the party making them.

In applying the maxim, "that he who does iniquity, shall not have

equity," to particular cases, it is not necessary that it should appear, that the iniquity was done to the person against whom relief is sought, although it must appear to infect the particular transaction out of which an equity is attempted to be set up.

The bill charged, that one Giles Vick intermarried with Delilah Flowers, daughter of Jacob Flowers, the Defendant, in the year 1788; that shortly after the marriage, Flowers gave to Vick, two negro slaves, named Jury and Patience: That in the year 1794, Vick became indebted to Wilkinson in the sum of £515 7*s.* for which sum he gave his bond, with one John Oldham his security; which bond being assigned to one Benjamin Williamson, suit was instituted thereon in Halifax Superior Court of Law, against Vick and Oldham. Several payments were made by Vick, but still a considerable balance remained due on the judgment; and pending the execution against the property of Vick and Oldham, Vick conveyed the said negro slaves, with the increase of Patience, to Flowers. The conveyance purported to be absolute and for a valuable consideration, but the bill charged, that it was made upon a secret trust between Vick and Flowers, that as soon as Vick's estate should be relieved from the aforesaid debt to Williamson, by having the same duly discharged, Flowers should reconvey the negroes to Vick; and that the conveyance was not made upon
(322) a valuable consideration, or if so, that the sum paid was merely nominal, and that it was expressly agreed between Vick and Flowers, at the time of the conveyance, that whenever the debt to Williamson should be paid, Flowers should reconvey the negroes. The conveyance was made in 1796, and Vick died in 1797. A short time after the conveyance, Flowers took possession of the negroes, and Oldham having discharged the balance due on Williamson's judgment, sued Flowers as executor *de son tort* of Vick, and recovered a judgment for the amount which he had paid as Vick's security. Flowers sold some of the negroes to discharge the judgment which Oldham recovered; which judgment being satisfied, this bill was brought against Flowers, to compel him to execute the secret trust aforesaid, and reconvey the residue of the negroes, charging that the debt to Williamson being satisfied out of Vick's property, Flowers was bound in Equity and good conscience to reconvey so many of the negroes as remained in his hands.

To this bill the Defendant demurred, and for cause of demurrer alleged, that the bill did not contain any matter of equity, whereon the Court could grant any decree or give the Complainant any relief or assistance as against the Defendant. And the questions arising upon this demurrer were sent to this Court for the opinion of the Judges.

This case being similar, in many of its circumstances, to the case of Jackson against Marshall's administrator, pending in this Court, and both cases depending in part upon the same principles, the facts of the latter case are here stated.

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(323)

JACKSON *v.* MARSHALL'S ADMINISTRATOR AND DEVISEE.

Pending a suit against A. as security of B, A, to defeat any recovery that might be made against him in said suit, conveys his property to C. by an absolute deed, purporting to be for a valuable consideration. And it was agreed between A. and C. that C should reconvey the property to A, whenever he should be requested. It appeared upon the trial of the suit against A. that the debt claimed of him had been paid by B, for whom he was security, and judgment was rendered in favour of A: upon which he filed a bill to compel C. to reconvey the property according to his agreement. Equity will not enforce this agreement, on account of its moral turpitude.

The bill charged that Jackson, in order to the more convenient settlement of his estate at a future day, so as to answer the exigencies of his family, concluded to raise a trust in fee on his estate, and to make such divisions and provisions out of the same, as a trust is capable of according to the rules of Equity, and which an estate at Common Law is not. That to this end, he applied to one Benjamin Marshall, late of Halifax county, now deceased, and made known to him his designs, and requested him to permit Complainant to make him a trustee for the said purposes: that Marshall consented thereto, and promised that he would, from time to time, make such conveyances as Complainant should direct, and reconvey the property to Complainant if ever requested to do so. That in pursuance of this agreement, Complainant, in May 1801, by deed duly executed, conveyed to Marshall two tracts of land, lying in Halifax county; and by another deed executed about the same time, he conveyed to Marshall all his stock of cattle, horses, hogs, and all his

other property, including negroes Hercules and Lydia. The bill charged that the conveyances were upon trust, for the benefit of the Complainant, and that the said trust was declared by Marshall, at and after the execution of the conveyances; that all the said property was by express agreement (324) to be at Complainant's disposal, and he was to take the profits and proceeds thereof, and Marshall was to convey the same at any time, as Complainant should direct: that although a consideration was expressed in the conveyances, none was ever paid by Marshall for the property. That Marshall had since died, having duly executed his last will, and therein devised the lands aforesaid to his son, Howell Marshall, and the other property he directed in his will to be sold, and the proceeds divided amongst his other children: that Jeremiah Marshall had caused the will to be proved, and administration with the will annexed to be granted to him: that he and the said Howell Marshall denied the trusts aforesaid, and pretended that the conveyances aforesaid were intended by the parties to be absolute, and subject to no secret trust. The bill prayed that they might be compelled to answer, and be decreed to reconvey the lands and other property to Complainant.

To this bill, Jeremiah Marshall, the administrator, put in his answer, and therein alleged, that he had no personal knowledge of the transactions charged in the bill, but believed, from every information which he had been able to acquire, that the conveyances were intended by the parties to be absolute; that a considerable part of the purchase money had been paid by Benjamin Marshall, previous to his death, and that Complainant held his bonds for the balance.

This cause coming on to be heard in the Court of Equity for Halifax district, sundry issues were submitted to a Jury, who found, that the conveyances mentioned in the bill were upon trusts, and not intended to be absolute; that they were made to defeat any recovery that might be made in a suit then pending in Halifax Superior Court against Complainant, as security for one Cofield, in which suit the Plaintiff failed to recover, it appearing that the debt was paid by Cofield before the institution of said suit. The Jury (325) also found, that Complainant, at the time of executing the said conveyances, was indebted to one Burt, and also one Hilliard, to a small amount, but that those debts bore a small proporlion to the value of his estate, and

that creditors were not intended to be defrauded by said conveyances, or hindered or delayed thereby of the recovery of their debts.

The bill, answer and findings of the Jury, were sent to this Court for the opinion of the Judges. This, with the preceding case of Vick and others against Flowers, was argued by *Cameron* and *Williams*, (Chatham,) for the Complainants, and by *Browne* and *Norwood* for the Defendants.

Cameron, for Complainants.—In making a decree in the case of Jackson against Marshall's administrator and devisee, the Court will take into consideration the facts found by the Jury, unless the testimony offered upon the trial was improperly received. The bill seeks to enforce a trust which the Jury have found, but which does not appear upon the face of the conveyances. Can this trust be proved by parol evidence, when the parties have purposely omitted it in the deeds? And if proved, will Equity enforce it? As to the first question, there can be no doubt but that parol evidence is to be admitted to prove a trust, where it is omitted to be inserted in a deed by fraud, accident or mistake; but where the trust is omitted purposely, the Court will be governed by the particular circumstances of the case, and will receive or reject the evidence, as will best subserve the ends of justice. This seems to have been the opinion of President Pendleton, in the case of Ross against Norvell, 1 *Wash.* 14. Norvell filed a bill to redeem certain negroes which, he charged, he had mortgaged to Ross, to secure the payment of a debt due to him. The negroes were conveyed by an absolute bill of sale, with a warranty, and a receipt for the consideration stated in the deed was endorsed thereon. The bill
(326) charged, that the conveyance, though absolute in form, was intended as a security, and that it was verbally agreed at the time, that Norvell might redeem at any time, upon payment of the principal and interest. Ross, in his answer, insisted that the sale was absolute, and was intended as a satisfaction of a prior debt due to him from Norvell. Parol evidence was received to prove the verbal agreement, and Norvell was permitted to redeem the negroes. The President of the Court of Appeals, in delivering the opinion of the Court, entered at large into the consideration of the question, Whether parol evidence could be admitted to set up this verbal agreement in contradiction to the deed?

And after an examination of the several cases upon this point, observed, "that the general principles of these cases prove, that parol evidence, where there is a deed, is not to be admitted in *all cases*, nor refused *in all*, and that every case must depend on its own circumstances." It is true, that in that case Norvell was suffered to remain two years in possession of the negroes, and this being contrary to the ordinary effect of a sale, was noticed by the Court, as a circumstance that gave an impression of a trust of some kind, between the parties. But the Court observed, that this circumstance rendered the difficulty less of admitting the parol proof; from which it is to be inferred, that without it, such proof would have been received. Indeed, as between the parties to the deed, such proof will seldom be refused; there is much reason to receive it with caution where the rights of third persons are to be affected.

As to the second question, Whether Equity will enforce the trust, if proved? it may be observed, that the Courts of Equity in this State have enforced such trusts. The Jury have found, that the conveyances were not made to defraud creditors, nor to hinder or delay them in the recovery of their debts. They were made to defeat a recovery that might be made, as Marshall apprehended, in the suit then pending against him; but as the Plaintiff failed to recover, (327) upon the ground that nothing was due to him, he cannot be considered *a creditor*, whose debt was to be defeated by the conveyances. It has been decided, that to set aside a conveyance, under the statute against fraudulent conveyances, it must appear that the person making the conveyance was a debtor, and the person to be defeated his creditor. For the statute speaks of persons indebted, and makes void the conveyances which shall be made by them to defeat, hinder or delay their creditors in the recovery of their debts.

Browne, for the Defendants.—Parol evidence cannot be admitted, to set up the trust which the complainant seeks to enforce. The deeds upon their face purport to be made for a valuable consideration, and in 1 *Ves.* 128, Lord Hardwicke declares, that where a deed mentions that it was made for a valuable consideration, no evidence can be received to shew that it was made for any other consideration; for this would be to admit parol evidence to contradict a deed. In the

present case, the deed declares that it was made for Marshall's use and the use of his heirs, &c. Can parol proof be admitted to contradict this? 3 *Wills.* 275, 1 *Br. Ch.* 92, shew that it cannot. The rule is, that parol evidence may be admitted, where the fact to be disclosed by it, and which creates the trust, has been left out of the deed by fraud, accident, or mistake; and the Court of Equity gives relief here, upon the ground of its ancient jurisdiction over cases of fraud, accident or mistake. To admit such evidence in other cases, would be to add to, detract from, or explain a deed. This question has been often decided, and in *Henry Black*, 659, there is a case in point, shewing that parol proof cannot be received as to any thing *dehors* the deed, unless it appear to have been left out by fraud, accident or mistake.

But if the proof be received, the trust which it proves is founded in such iniquity, that Equity will not enforce it.

(328) Equity will not enforce a contract, nor a Court of Law give damages for the breach thereof, where the consideration of such contract is illegal. This is the general principle to be extracted from various decided cases, particularly 3 *Term Rep.* 454—4 *Id.* 466. Assumpsit is an equitable action, in which damages are recovered for the breach of such contracts as Equity will enforce. Equity cannot decree against a positive rule of Law—2 *Com. Dig.* 475–6. And if the rules of Law forbid a recovery for the breach of the contract, they likewise forbid the enforcement of the contract in Equity. In 4 *Term Rep.* 329, the principle upon which the Court always acts, in cases like the present, is laid down by Lord Kenyon: "No person shall take the chance of committing a fraud, without running the risk of losing by it, when he is detected." Upon this principle, an alteration in a bond or note avoids it, and a fraudulent conveyance is made good against the party making it.

If a voluntary conveyance be made, with a view to being indebted at a future time, it is fraudulent—2 *Atk.* 481—3 *Ves. jun.* 461. Sometimes there is no debt until judgment is obtained—2 *Bl. Com.* 436. A judgment recovered for criminal conversation entitles one to set aside a fraudulent deed—*Prec. Ch.* 103—1 *Eq. Ab.* 149. The statutes against fraudulent conveyances cannot receive too liberal a construction—*Cowp* 434. Hence all gifts, grants, &c., which are fraudulent, are void as to creditors, whether they claim by elder or younger titles—*Com. Dig. Covin, A*—but good against the

party and his representatives—*Yelv.* 196—*Cro. Jac.* 271—1 *Ver.* 100, 122, 464—*Com. Dig. Covin, B.* 2. The object of the Law is to put an end to all trust and confidence between persons disposed to commit a fraud.

WRIGHT, Judge, delivered the following opinion, as the opinion of the Court in both of the preceding cases:

It is rather a singular circumstance, that claims, such as the present bills set up, are made at this day, and attempted to be enforced without the authority of a
(329) single adjudged case to support them. That conveyances like those set forth, made under similar agreements, have before occurred, there can be little doubt; and it is equally certain, that if these agreements had ever been considered as entitled to the assistance of a Court of Equity, the diligence and industry of the Complainant's counsel would have discovered the cases in which application to enforce them had been sustained, and relief granted. The silence of the Books on the subject, would seem of itself to afford strong presumptive evidence, that the Complainants are not entitled to the relief which they seek. But although such presumption exists, yet if they could have shewn, that under the influence of any of those principles which direct the decisions of our Courts of Equity, they were entitled to relief, the Court would feel bound to grant it, notwithstanding it might seem to militate against the policy of the statutes which have been, from time to time, made for the protection and security of creditors. It is believed, that so far from granting relief to the Complainant, not only the statute against fraudulent conveyances, but every principle and rule which has been adopted and matured in Courts of Equity, for the purpose of suppressing fraud and of inculcating a course of fair and honest dealing among men, directly forbid it. The Complainant's counsel rested their arguments much on the nature of trusts in the Civil Law, from which they have been taken and adopted into our Jurisprudence by the Courts of Equity; and cases were cited to shew, that by that Law, they were enforced, although they had originated in fraud on the part of the *cestui que trust.* To this it is a sufficient answer to say, that although the Courts of Equity may have derived their idea of a trust from the Civil Law, yet that that Law has no binding force or authoritative influence on these Courts, which are guided altogether by a

set of rules and principles, peculiarly their own, that have grown out of the condition and positive institutions of the country where they have been established. The Com-
(330) plainant's claim will derive very little weight from the consideration that it would have been enforced by a Roman Prætor, if it be opposed by any of these rules or principles. Some reading is also cited from *Saunders on Uses*, and *Reeves' History of the English Law*, to shew that trusts originated in covin, and that on their first introduction, they were applied to what might be deemed fraudulent purposes; that is, to avoid the statutes of mortmain. But it is to be observed, that the clerical Chancellors who presided in the Courts of Equity at that time, did not consider these conveyances as dishonest or against conscience, and rather leaned in favor of them, and enforced the secret trusts which arose out of them, and which produced a variety of acts of Parliament that were deemed necessary to prevent the fraudulent purposes to which they were applied: among others, the 13th and 27th of Elizabeth; of the former, our act of 1715 is nearly a copy. The Complainant's counsel, however, contend, that although the statute makes the conveyances to which it alludes void, yet that it does not give validity to anything, and hence an inference is drawn, that when a debt is discharged, to delay the payment of which a conveyance or secret trust is made, the conveyance ceases to be binding, and the debtor becomes entitled to a reconveyance. But this argument is certainly unsound; for although the statute does not validate anything in express terms, it does by a very strong implication. It declares, "that all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels," &c. made for the purposes, or with the intent stated in the preamble, shall henceforward be deemed and taken "only as against that person or persons, his or their heirs, executors, administrators and assigns, and every of them, whose actions, suits, debts, accompts, damages, penalties and forfeitures, shall release by such covinous or fraudulent devices and practices, as is aforesaid, or shall or might be in any wise disturbed, hindered, delayed or defrauded,
(331) to be clearly and utterly void, frustrate and of no effect; any pretence, colour, feigned consideration, expressing of use, or any matter or thing to the contrary notwithstanding." As to the parties themselves, there-

fore, it must mean, that it shall be taken to be good; for that which would otherwise be good, and is declared void only as to a certain intent, remains good to all other intents; and that such has been the construction which the statute has heretofore received, may be gathered not only from the opinion of elementary writers on the subject, but from adjudged cases in the English Courts, and in our own—2 *Bac. Abr.* 605—*Fonblanque on Equity*, 139—*Roberts on Fraudulent Conveyances*, 643—*Cro. Jac.* 270—1 *Ch. Ca.* 59—2 *Hayw.* 348. In the case cited from *Cro. Jac.* the alienee was permitted to recover at Law from the executors of the debtor, the property conveyed, on the ground, that although the conveyance was void as to creditors, (it being made to defraud them of their debts) yet that it was good as against the person making it, and his representatives. But supposing no adjudged case or elementary opinion could be found in support of such a construction, yet the object and spirit of the Law would seem evidently to require it. The design and intention of the act was the protection and security of creditors: this can only be effected by destroying all confidence between the parties to secret agreements; by multiplying the difficulties which fraudulent debtors would have to encounter in attempting to defeat their claims; and denouncing every species of forfeiture and risk against such attempts, which can be raised up against them in a Court of Equity. The act of Assembly, therefore, would seem a complete answer to the claims of the Complainants. But independent of the act, the claims are in direct opposition to some of the most fundamental maxims which direct and influence the conscience of a Chancellor. *He who hath done iniquity, shall not have Equity: He who requires the aid of a Court of Equity, must disclose a fair and honest transaction:* are maxims which
(332) have never been departed from, and are in direct hostility to the claims of the Complainants. It is true, that *Francis*, in his exposition of the first maxim, says that the iniquity must be done to the Defendant himself, and this exposition was much relied on by the Complainants' counsel. But this exposition is certainly incorrect, nor does the case cited by *Francis* for the purpose, prove it. He cites a case where a person, during the great rebellion, who, in order to avoid a sequestration by the usurper, had sworn, in an answer in Chancery, that he had been satisfied for a debt, was permitted to recover by a Chancellor sitting after the restora-

tion ; and who no doubt, held that the opposition to the claim was more unconscientious than the means taken to avoid the sequestration. The true exposition of the maxim is to be found in 1 *Fonbl.* ch. 4, sec. 13, where, after stating it, he says, "But this must be understood where such person is Plaintiff," &c. And the following adjudged cases illustrate it: 2 *Vern.* 602—1 *Ch. Ca.* 202—1 *Vern.* 475—2 *Ves.* 156. The case of Gale *v.* Lendo, 1 *Vern.* 475, was a case where the party against whom relief was sought, was in no wise to be injuriously affected by the transaction, in as much as she had received the money for the bond which she had given to her brother on her marriage. The obligor, however, was not permitted to recover, because he had taken it with a fraudulent intention to operate against her husband, who had died; and although he was not affected by it, nor could his estate be made liable for it, yet as it was given originally for a fraudulent purpose, it was void as against all persons. This case is also an answer to the argument of the counsel, which went to shew that although a fraud was contemplated, yet none was effected, and that therefore no forfeiture should attach against Complainants. The fraud consists, not in the actual injury sustained by the person intended to be injured, but in the act itself, and the turpitude of the motive which influenced the party to its commission; and that which
(333) was once a fraud always remains a fraud—1 *Vern.* 475.

It would therefore seem, from this view of the cases, that so far from Complainants' being entitled to relief upon any ground of Equity, they are opposed not only by the statute against fraudulent conveyances, but also by the maxim, that he who hath done iniquity, shall not have Equity; and by the principle, that no Plaintiff is entitled to the aid of a Court of Equity to enforce a contract entered into with a fraudulent intention, and for a fraudulent purpose. This renders it unnecessary to consider the other part of the cases, that is, whether parol proof should be admitted to prove the private agreement; for if this agreement had been reduced to writing, with all possible solemnity, it would not have received the aid of a Court of Equity for a specific performance. The bills must therefore be dismissed.

ALLISON *v.* GREGORY & SONS AND KIRKLAND.

From Hillsborough.

An equity of redemption cannot be sold by virtue of an execution at Law.

Allison being indebted to Gregory & Sons, of Charleston, mortgaged to them a house and lot in the town of Hillsborough, to secure the payment of the debt: and being also indebted to one Armstead, he was sued by Armstead in Edenton Superior Court, and judgment was obtained against him; upon which judgment an execution was issued, directed to the Sheriff of Orange county, who levied it upon the aforesaid house and lot, and at the sale, Kirkland became the purchaser. Some time after the purchase, Kirkland filed a bill against Gregory & Sons, for the purpose of redeeming the house and lot as to them, and against Pratt and (334) Taylor, who had purchased from Allison other parts of the property mortgaged to Gregory & Sons, for the purpose of compelling them to pay their proportional parts of the money due on the mortgage. Gregory & Sons filed a bill to foreclose the equity of redemption, and Allison filed a bill against Gregory & Sons and Kirkland, to redeem the house and lot. To Allison's bill, Kirkland demurred, and the question arising upon the demurrer was, Whether Allison's equity of redemption in the house and lot was liable to be sold under an execution at Law?

By the Court—An equity of redemption cannot be sold by virtue of an execution at Law. Allison is therefore entitled to redeem, but Kirkland should stand in the place of Armstead, whose debt he satisfied, and is entitled to have his money, with interest thereon, refunded by Allison, he being accountable to Allison for the rents and profits of the house and lot, during the time that he has had them in possession.*

*The General Assembly in 1812, passed an act subjecting an equity of redemption to sale under an execution at Law.

SHAW *et al. v* SHAW *et al.*

From Fayetteville.

A legacy or distributive share cannot be recovered, without setting up a legal representative of the deceased, on whose estate a claim for the the one or the other is made.

This was a bill of revivor, and the original bill which it was the object of the present bill to revive, was brought to recover a legacy bequeathed by the last will and testament of Dushee Shaw, the elder, of which Duncan Shaw, Niel Shaw, and one Buie, were appointed executors. But from the statement made by the Complainants' bill, it ap-
(335) peared that the present Defendants were neither the legal representatives of the said Dushee Shaw, the elder, nor were they expressly charged in the bill with having taken into their possession any of the assets of the said Dushee: but some of them, to-wit, Lucy, John and Niel Shaw, were called upon as executors of Daniel Shaw and Niel Monroe, as executors *de son tort* of Catharine Shaw, who were stated to have been the administrators of Duncan Shaw, the acting, but not the surviving, executor of Dushee, the testator. To the right of the Complainants to have their bill revived against the Defendants, upon this statement, the Defendants demurred, and assigned two grounds of demurrer. First, that the Complainants had shewn no title or right to revive against them, or to call them to an account, as the representatives of Daniel Shaw and Catharine Shaw. Secondly, that they had not shewn such right or interest in Defendants, respecting the subject matter of the bill, as would make them liable to Complainants, or would sanction a decree against them.

WRIGHT, *Judge*, delivered the opinion of the Court:

We are of opinion, that the demurrer is sustainable upon both grounds. For as to the first, as Daniel Shaw and Catharine Shaw were only the administrators of Duncan Shaw, the executor of Dushee Shaw, out of whose estate the legacy is claimed, the Defendants, even if a legacy could be recovered from any but a legal representative of the testator, were not bound to the discovery or relief sought from them; in as much as Daniel Shaw and Catharine Shaw, whom they represent, are not charged with having taken into their possession any part of the fund out of which the legacy was payable. As to the second: The Defendants are not themselves charged

as the representatives of the testator, Dushee Shaw, the elder; and even supposing them to have been charged with (336) having possession of assets subject to the payment of the legacy, yet it has already been decided by this Court, that a legacy or distributive share cannot be recovered without setting up a legal representative of the deceased, on whose estate a claim either for the one or the other is made. Let the demurrer be allowed.

Ex parte MASON.

Under the act of Congress regulating the enlistment of soldiers in the army of the United States, where the father is dead and the son is without a guardian or master, "the consent in writing" of the mother, if she be alive, is necessary to make valid the enlistment of the son, if he be a minor—and such minor, enlisted without such consent, was discharged upon a writ of habeas corpus.

Edward Mason, a minor under the age of twenty-one years, enlisted as a soldier in the army of the United States, without the consent of his mother, his only surviving parent. He had no guardian, nor was he bound apprentice to any master. He was brought upon a writ of *habeas corpus* before his Honor Judge TAYLOR, who was of opinion that his enlistment was illegal, and that he ought to be discharged; but understanding that this opinion differed from that of one of his brethren of the bench, he ordered the case to be sent to this Court.

BY THE COURT—The act of Congress under which this application for the discharge of Mason is made, declares, "That no person under the age of twenty-one years, shall be enlisted by any officer without the consent in writing, of his parent, guardian or master, first had and obtained, if any he have." There is no rule of construction under which the term *parent* used in this act, can be considered as extending to the father and not to the mother. It is not material to enquire how the mother stood at Common Law towards (337) the son during his nonage, or to point out the difference which the principles of the feudal institutions set up between the rights and duties of the father, and those of the mother, towards the eldest son, and indeed towards all

the children. This difference grew up at a time when the education of the son was purely military, and the mother was not only incompetent, but considered unworthy of attending to it. Since civilization has been introduced, the authority of the mother over her children has been gradually extended, and she has taken an active part in their education. Congress no doubt thought, that where the father was dead, and the children without guardians or masters, they should be subject to the control of the mother, when, during their minority, attempts should be made to enlist the males in the army of the United States. We are therefore of opinion, that in this case, the mother is the "*parent*," whose consent in writing was required, and her son being enlisted without such consent, that he must be discharged.

JUDGES OF THE SUPREME COURT

OF

NORTH CAROLINA,

DURING THE YEAR 1810.

JOHN LOUIS TAYLOR, Esquire,
JOHN HALL, Esquire,
FRANCIS LOCKE, Esquire,
SAMUEL LOWRIE, Esquire,
LEONARD HENDERSON, Esquire,
JOSHUA G. WRIGHT, Esquire.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JULY TERM, 1810.

DUDLEY *v.* CARMOLT.

After verdict, the Court will not arrest the judgment, because the writ is *tested* by the Clerk, and signed by the Deputy Clerk. The stat. 5, George 1st, ch. 13, is in force, and cures defects in the writ, by verdict. The 25th sec. of the Constitution intended merely to prescribe an uniform mode of issuing writs.

This case was sent up from the Superior Court of Law, for the District of Wilmington, to June Term of this Court, 1806, upon reasons filed in arrest of judgment. Dudley sued out the following writ against Carmolt.

"STATE OF NORTH-CAROLINA,

"*To the Sheriff of Onslow County*—GREETING.

"You are hereby commanded to take the body of Robert Carmolt, if to be found in your county, and him safely keep, so that you have him before the Justices of our County Court of Pleas and Quarter Sessions, to be held for your County, at the Court-house in Onslow County, on the second Monday of October next, then and there to answer to Christopher Dudley, of a plea of trespass on the case, &c. damage five hundred pounds: Herein fail not, and have you then and there this Writ.

(340) Witness, Robert W. Snead, Clerk of our said Court at Onslow County, the 8th day of July, 1799, and the 24th year of our independence.

(Signed,) "W. N. SNEAD, D. C. C. C."

The Defendant appeared and pleaded in chief to the action, and upon the trial there was a verdict for the Plaintiff. The Defendant by his counsel moved that the judgment be arrested, and assigned the following reasons.

1st. That the *capias ad respondendum* upon which the

Defendant was arrested, and required to answer to the complaint of the said Christopher in this suit, was not signed by the Clerk of the Court from which said writ issued, to wit, the Clerk of the Court of Pleas and Quarter Sessions for the County of Onslow, as appears by the record in said suit.

2d. That the said writ, as appears from said record, was signed by W. N. Snead, D. C. C. when from the said writ it appears, that Robert W. Snead was, at the time the said writ issued, Clerk of the said Court for the County of Onslow, from which the writ issued.

3d. That the said writ, as appears in said record, was tested in the name of Robert W. Snead, Clerk of the said Court, and signed by W. N. Snead, D. C. C.

(Signed,) JOCELYN,
GASTON,
For Defendant.

This case was argued by *Jocelyn* for the Defendant several terms ago; the Court took time to advise, and at this term gave judgment for the Plaintiff.

LOCKE, Judge, delivered the opinion of the Court:

The defect in the writ would have been fatal, if advantage had been taken thereof by plea in abatement; but as the Defendant has pleaded in chief, it would seem to amount to a waiver of that advantage, and be equivalent to an acknowledgment on his part that he has been brought into Court by a proper process—*1 Sira.* 155, *Salk.* 59. However, upon this point, the Court gives no opinion, believ-
(341) ing that the case can be decided on a ground liable to less exception or doubt. The stat. 5 George 1st, ch. 13, was passed, (as the preamble states) for the purpose of preventing writs of error and reasons in arrest of judgment after verdict, and expressly declares "that where any verdict hath been or shall be given in any action, suit, bill, plaint or demand, the judgment therefor shall not be stayed or reversed for any defect or fault either in form or substance, in any bill, writ original or judicial, or for any variance in such writs from the declaration or other proceedings." Such error, therefore, was cured by the verdict, or at least could not be taken advantage of after verdict. This statute, the most broad and extensive of any passed on the subject, seems completely to cure the defect contained in this writ. Great doubt, however, was entertained by the Court, and much

time was spent in ascertaining whether this statute was in force in this State; but in examining the several acts of Assembly, the Court have found an act passed at Newbern, on the 3d November, A. D. 1768, entitled "an act for dividing the Province into six equal districts."—*Iredell's Revisal*, 239. The body of this act is not recited in this revisal of the laws: but upon looking into the act, we find, that among other things, it enacts "that all the statutes of jeofails and amendment, which now are in force in England, are hereby declared to extend to and be in force in this colony, and shall be duly observed by all Judges and Justices of the several Courts of Record within the same, according to the true intent and meaning of said statute." In the year 1777, ch. 2, the Legislature further declared "that all the statutes of England and Great Britain for the amendment of the law, commonly called statutes of jeofails, and which were heretofore enforced in this territory by any act or acts of the General Assembly under the late government, are hereby declared to have continued and to be now in full force
(342) in this State, and shall be duly observed by all Judges and Justices of the several Courts of Record within the same, according to the true intent and meaning of the said statutes, unless where the same are or may be altered by this or any other act." Hence it evidently appears, that the stat. 5 George 1st, is in full force and ought to be observed by Judges and Justices of our Courts.

But it is contended for the Defendant, that the 26th section of the Constitution supercedes the statute of 5th George 3d, as to the point now under consideration. That section declares, that "all writs shall run in the name of the State of North Carolina, and bear teste and be signed by the Clerks of the respective Courts." The Court think that the Constitution merely intended to prescribe one uniform mode of issuing writs, and can have no greater effect or binding force than a constitutional act of the Legislature. Suppose then, that an act of Assembly had prescribed, that all writs should be signed and bear teste by the Clerks of the respective Courts; would not the statute above recited, cure such defect after verdict? it surely would. In such a case, we would be led to enquire how ought this defect to be taken advantage of? Certainly in the same way in which, in England, advantage would be taken of a writ that varied from the prescribed form, and that is by plea before verdict;

for as there the statute of 5th George 1st, would cure error in the writ after verdict, so here, the same statute being in force will cure the like error. Let the reasons in arrest be overruled, and judgment be entered for the Plaintiff.

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(343) RICKETS *v.* DICKENS & WAIT.

From Hillsborough Superior Court of Law.

In a deed of bargain and sale, the words "grant, bargain, sell, &c." do not imply a warranty of title: nor do the words of a deed describing the length of lines and boundaries, &c. and concluding with the words "containing so many acres," import a warranty of quantity.

The action of covenant will lie upon the words of a deed "will warrant and defend the premises to A. B. and his heirs forever." And this from necessity, as otherwise a vendee would be without a remedy in many cases: for the writ of warrantia chartæ is not in use in this State, nor are real actions, in which voucher is used.

Plea, "that the Plaintiff before the commencement of the action, had sold and conveyed to another in fee, the lands mentioned in the deed" overruled, and demurrer to said plea sustained.

This was an action of covenant, and the declaration contained two counts. In the first, the Plaintiff declared, on a deed of bargain and sale made by Defendants to him, wherein, after acknowledging the receipt of two hundred and fifty dollars, the consideration therein mentioned, they proceed thus, "have granted, bargained and sold, aliened, released and confirmed, and by these presents do grant, bargain and sell, alien, release and confirm, unto the said Anthony Rickets, his heirs and assigns forever, a tract of land, &c.: beginning at Harris' corner white oak, &c. *containing two hundred and fifty acres*, &c. to have and to hold the said land and premises, and every part thereof, unto the said Anthony Rickets, &c." The breach of this contract assigned was, that the lines which bounded the tract of land were not as long as represented by the deed, and that the boundaries mentioned in the deed contained only 244¾ acres, and not 250.

In the second count, the Plaintiff declared on another deed of bargain and sale made between the same parties, in which the Defendants, after acknowledging the receipt of one hundred and eighty-three dollars, the consideration therein men-

tioned, proceeded thus, "have granted, bargained and
(344) sold, and by these presents do give, grant, bargain and sell, alien, enfeoff, release and confirm unto the said Anthony Rickets, his heirs and assigns forever, a certain tract or parcel of land, beginning, &c. containing one hundred and eighty-three acres, be the same more or less, &c. to have and to hold, &c.; and the said Robert Dickens and William Wait, and their heirs and every of them, all and every other person or persons, and their heirs, anything having or claiming in the premises above mentioned, or any part thereof, by, from or under them, or any other person or persons, shall and will warrant and defend the said premises, with the appurtenances thereunto belonging, to the said Anthony Rickets and his heirs forever, by these presents. The breach of this covenant assigned in the declaration, was, that the Defendants, Dickens and Wait, were not, at the time of executing the deed, seised of twenty-three acres of the land included within the boundaries set forth in the deed, and that one Ann Horton was seised in fee of the said twenty-three acres, at the time the said deed was executed, and was thereof possessed, and was so seised and possessed long before that time and ever since.

The Defendants, among other pleas, pleaded, "That the Plaintiff, before the commencement of this suit, had sold and conveyed in fee simple, the lands mentioned in the said deed, to R. B." To this plea the Plaintiff demurred, and the Defendants joined in demurrer.

The Jury found for the Plaintiff, upon both counts in the declaration, and assessed damages, and the case was sent to the Supreme Court upon the following points: 1. Ought the demurrer to be sustained? 2. Is the Plaintiff entitled to judgment on the first count? 3. Will an action of covenant lie upon the warranty contained in the deed mentioned in the second count?

TAYLOR, *Judge*, delivered the opinion of the Court:

So large a proportion of the contracts of the people of this State arises from the commerce in lands, that it is of great consequence to render all those rules which relate to
(345) contracts and warranties, explicit and intelligible: hence confidence and security will be promoted, litigation suppressed, and a greater degree of precision introduced into deeds, than it is now customary to employ. The

necessity of this will be manifest from a very slight attention to the principles which relate to the subject. We are in this case called upon to decide, whether an action of covenant will lie upon the deficiency of five and a quarter acres stated in the first count of the declaration? The deed is a bargain and sale, and contains no warranty, nor covenant to warrant: it must therefore be considered to have been the intention of the bargainor, and to have been so understood by the bargainee, that no warrant accompany the sale. However equitable it may appear, on principle, that compensation should be made by the seller upon a deficient quantity, (and the Civil Law adopts that idea,) yet according to the established theory of the Common Law, no action can be sustained where the sale is free from the imputation of fraud. "The word *warrantizo*," says *Littleton*, *p.* 735, "maketh the warranty, and is the cause of warranty, and no other word in our Laws." If the seller in any case should conceal from the buyer, a fact or instrument which would disclose a defect in the title, or neglect to inform him of an incumbrance to which it is subject, these and other similar cases of fraud, may be remedied by an action on the case, in the nature of an action of deceit: and in such cases the action may be maintained, not only where there is no warranty, but where the warranty does not reach the particular defect—*Coke Litt. in Notes.* Cases of fraud form an exception to many of the rules of Common Law: a strongly marked feature of which is to prevent the contrivers of dishonest attempts from being benefitted by them, and to break down every barrier behind which covin seeks to entrench itself. The next enquiry is, Whether the deed contains any words from which a warranty can be implied? And (346) here it might be sufficient to say, that the deed is of that class which derive their principal efficacy from the statute of uses; that it was seldom resorted to before the statute; and that it is only in the Common Law conveyances of feoffment, confirmation, release, &c. that particular words imply a warranty. It may, however, be a more satisfactory ground of decision, to consider this case as if the action was brought upon a Common Law conveyance. We will therefore examine the doctrine upon this subject, as it is laid down by the most approved writers. The statute "*De Bigamis*," is laid down by *Lord Coke*, c. 6, to be declaratory of the Common Law in relation to this point. According

to this statute, "in deeds wherein is contained '*dedi and concessi*,' without homage or without a clause of warranty, and to be holden of the givers and their heirs by certain services, it is agreed that the givers and their heirs shall be bound to warranty; and where is contained '*dedi*' and '*concessi*,' &c. to be holden of the chief lord of the fee, and not of the feoffors and their heirs, reserving no services, without homage or without the aforesaid clauses, their heirs shall not be bound to warranty, notwithstanding the feoffor, during his own life, by force of his own gift, shall be bound to warranty." Thus it appears by this statute, that the word "*dedi*" bound the feoffor and his heirs to warranty, and the reason of it, according to *Lord Coke*, was, "That when '*dedi*' is accompanied with a perdurable tenure of the feoffor and his heirs, then '*dedi*' importeth a perdurable warranty, from the feoffor and his heirs to the feoffee and his heirs."—2 *Inst.* 275.

The statute of *quia emptores*, afterwards abolished subinfeudations, and consequently with them, the warranty, so far as it respected the heirs of the feoffor: because as this was a consequence of tenure, it could not subsist without it. Thenceforward the implied warranty only bound the donor during his own life, and except in the case of homage auncestrel, the heirs could not be bound without an (347) express warranty. But there is no other word besides "*give*," which implies a warranty in the conveyance of fee simple estates—*Coke Lit.* 385—consequently, neither the nature of the deed itself in the present case, nor the words contained in it, will permit us to imply a warranty. On the first count, therefore, the Defendant is entitled to judgment.

By the warranty, which is the foundation of the second count, it must be admitted that an obligation is created, which in England is enforced by a writ of *warrantia chartæ*, or by *voucher*. The first has never been used in this State; the second is permitted only in real actions, which has never been resorted to here. Unless then an action of covenant is sustained, the party who has an acknowledged legal right is without remedy. The reason why an action of covenant lies not in England on a warranty is, that the party has a higher and better remedy, which the law always compels a person to use. But even there, if that remedy cannot be afforded him, the law permits him to bring covenant; as if

a term for years only be recovered out of an inheritance which has been warranted to him, as in this case, he could not vouch, for that is permitted only in real actions; nor could he bring a *warrantia chartæ*, for that is where some person demands or claims the fee of him. Of necessity it gives a lesser remedy. This doctrine is exemplified in *Yelverton's Reports*, 139, Pencombe *v.* Rudge. We therefore think that the action of covenant will lie upon the warranty contained in the second count in the declaration.

With respect to the plea relied upon, and which forms a part of the case, the Court are not aware of any principle upon which it can be sustained. Had the suit been brought in the name of the Plaintiff's vendee, there might have been some ground for an objection; for as the breach was coeval with the covenant, the right to sue was a chose in action, the propriety of assigning which is at least questionable. But it is evident, that as the defendants were (348) not seised of the twenty-three acres when they sold, nothing passed to the Plaintiff by the deed, and he could convey nothing to R. B. Consequently, with respect to the quantity in dispute, the plea fails in point of fact We think the plea should be overruled, and the demurrer sustained. Let judgment be entered for the Plaintiff.

HALL, Judge, contra. I agree with my brethren as to the first and third points made in this case, but disagree with them as to the second. My reasons for this disagreement are given at large in the next case of Powell *v.* Lyles, decided at this term.

POWELL *v.* LYLES.

From Wake.

In a deed of bargain and sale, the words "give, grant, bargain and sell," do not imply a warranty.

The clause of a deed describing the length of lines and the boundaries of a tract of land, and concluding with the words, "containing so many acres," does not amount to a covenant of quantity; and no action lies, if the quantity be less than that mentioned; as the word "containing" does not import or constitute a covenant.

POWELL *v.* LYLES.

This was an action of covenant brought on the following deed, to-wit:

"This Indenture, made this twenty-first day of January, eighteen hundred and seven, between Samuel Lyles, of the County of Wake, and State of North Carolina, of the one part, and Caswell Powell, of the County and State aforesaid, of the other part, witnesseth, that the said Samuel Lyles, for and in consideration of the sum of five hundred pounds, lawful money, to him in hand paid by the said Caswell Powell, the receipt whereof he the said Samuel Lyles doth hereby acknowledge, and himself fully paid, hath given, granted, bargained, sold and conveyed unto the said Caswell Powell, his heirs and assigns forever, a certain tract or parcel of land, lying and being in the county and (349) State aforesaid, on the south side of Neuse river, *containing three hundred and forty acres;* beginning at a hickory, Abbot's corner, thence south three hundred poles to a hickory in Bohannoh's line; thence west an hundred and twenty-nine poles with the said line to a pine, Jacob Riches' corner; thence north three hundred poles to a pine in Abbot's line; thence with the said line to the first station: To have and to hold the said lands, with all the privileges and benefits thereunto belonging, to him the said Caswell Powell, his heirs and assigns forever, against the lawful claim or claims of any person or persons whatsoever; and I the said Samuel Lyles, for myself and my heirs, do further agree that I will make or assign any deed or writing of conveyance, when thereunto required by the said Caswell Powell, his heirs or assigns, that shall be judged necessary to authenticate the same. In witness whereof, I have hereunto set my hand and seal the year first above written.

SAMUEL LYLES. [SEAL.]

Signed, sealed and delivered
in the presence of
JAMES FORT,
POLLY FORT,
CHARLOTTE EMBRY."

Some time after the conveyance, an accurate survey of the land mentioned in the said deed, was made, and the boundaries were found to be correct, but the quantity of land was deficient by 17¼ acres. The question submitted to the Supreme Court was, whether an action of covenant would lie on this deed to recover damages for such deficiency?

TAYLOR, *Judge*, delivered the opinion of the Court:

This case does not essentially differ from that of Rickets *v.* Dickens & Wait, decided at this term: in both cases the actions are brought upon deeds of bargain and sale. The one now declared on contains no covenant of warranty, and thus far corresponds with the deed set forth in the first count of the declaration in the other case: but the word "*give*" is contained in the deed in the present case, which, according to the principles stated in the case of Rickets *v.* Dickens & Wait, would imply a warranty, if inserted in a deed of feoffment,

&c.: but in other forms of alienation gradually introduced since the statute of *quia emptores*, no warranty what-
(350) soever is implied, they bearing no sort of analogy to the original feudal donation. Lord Coke, in illustrating the statute *de bigamist*, more particularly explains the several conveyances at Common Law, in which that word implies a warranty. "The letter of this act, says he, in 2 *Inst.* 275, extends but to the feoffor upon a feoffment made; but if "*dedi*" doth enure by way of release or confirmation, it importeth a warranty during the life of him who makes the deed: so it is, if a reversion expectant upon an estate for years, life, or in tail, be granted by this word "*dedi*," and attornment had; here "*dedi*" doth import a warranty, though the estate passeth not by way of feoffment." Vide also 2 *Blac. Com.* 210. The deed in this case being a bargain and sale, no implied warranty ariseth by force of any words, and though it would be difficult to assign any satisfactory reason why the distinction should be preserved at the present day, when deeds vary from each other only by a slight verbal difference, and when equal validity is conferred upon all by the ceremony of registration: yet the Court has no power to remove ancient land-marks: they must administer the law as it is written, and leave the Legislature to alter what may be deemed inconvenient. There is a covenant in this deed for further assurance, which probably was designed by the parties to compel a future execution of a conveyance containing the necessary warranty. If that be the case, the Plaintiff cannot be remediless, although, in the present suit, there must be judgment against him.

HALL, *Judge*, *contra*.—*Espinasse*, in his treatise upon the action of covenant, page 267, says "there is no need of the word covenant, nor of any particular form of words to constitute a covenant in *deed*: for anything under the hand and seal of the parties importing an agreement, shall support this action as amounting to a covenant. As in the case of a lease for lands, in which are the words "yielding and pay-
(351) ing" so much rent; this is a covenant, and this action lies for the non-payment, for it is an agreement for the payment of rent, which amounts to a covenant," and he cites 1 *Roll. Abr.* 518, 519. *Sheppard*, in his *Touchstone*, page 87, speaking of deeds, says, "that the construction should be made upon the entire deed, and that *one* part of it doth help to expound *another*, and that every word (if it may be)

may take effect and none be rejected, and that all the parts do agree together, and there be no discordance therein." Vide also *Plow.* 160. And many other authorities might be referred to which support the same principles. It must then be admitted, that every sentence in the deed which is now the subject of controversy, shall have some meaning attached to it, and the true question is, do the words and sentences of the deed import an agreement on the part of the bargainor that there are *three hundred* and *forty* acres in the tract of land which he conveyed by this deed? Lands may be described in a deed of conveyance by *course* and *distance* directed by marked lines and corners, or by *known* and *visible* boundaries only, without mentioning course and distance. As to the first mode, a mathematician would tell you that there was sufficient certainty in it without making any actual survey. But when he should be told, that although a deed called for courses and distances, yet if the distances were longer or shorter, or courses different from those called for in the deed, he must be bound by them, he would probably think it safer to make an actual survey.

It is unnecessary to cite authorities to prove that course and distance must be controlled by real lines and corners. This rule has been long established by the Legislature, and enforced by judicial decisions. Where the lands are described by known and visible boundaries, without course or distance, there is generally a greater necessity for a survey. In the case now before us, three of the lines are said to run certain courses and distances to certain corners: The fourth runs from a pine in Abbot's line with the said line
(352) to the first station. Those distances may be found to be shorter *in fact*, than those called for in the deed. The fourth line instead of being straight, may form a semicircle, because Abbot's line, with which it runs, may be of that form. Who must be supposed to be best acquainted with these lines and the quantity of acres contained within them, the purchaser or the seller? I apprehend the *seller:* and the parties to the deed for the land in question seems to have thought so too; for, in the deed by which he passes his title, and which evidences the contract of sale, he not only sells the land within the boundaries therein set forth, but sells it as "*containing*" three hundred and forty-three acres. But it is said that this latter member of the sentence is only descriptive of the land, and nothing more.

To this I answer, if it be descriptive only, it must be as to quantity, and nothing else. If then the seller has by his deed described the land as "*containing*" so many acres, when in fact it does not; if he must be supposed to have been best acquainted with the quantity; if "every word should have effect in a deed (if it may be) and none be rejected," I think the conclusion must be, that the Defendant is liable for a deficiency.

It is asked, however, if upon a survey it should have been found that the tract of land contained more than three hundred and forty-three acres, what would have been the consequence? Could the Defendant claim compensation beyond the stipulated price? It is evident that he could not; and for the reasons before given, namely, that he has sold all the lands within certain boundaries, and let the quantity be what it may, he can claim no more than what he has agreed to take for *all the lands within such boundaries*. Nor could the Plaintiff set up a claim in the present case, had the Defendant omitted to stipulate, in addition, that there were within those boundaries three hundred and forty-three acres. If the words "containing three hundred and forty-three acres" do not amount to such a stipulation, it appears to me that they can mean nothing: for all the lands (353) contained within the boundaries set forth, would have passed without these words; and where persons sell lands and use these words merely as descriptive of the land, without intending to create a covenant as to quantity, they add the words "*more or less*," "*by estimation*" or some other words which shew their intention to be not to bind themselves as to quantity. To use the words of President *Pendleton*, in the case of Joliffe and others *v.* Hite and others, 1 *Call.*, 301, "a man wishes to sell his land, and another willing to purchase, enquires what is the quantity? The vendor answers, I hold it for so many acres, but I mean to sell the tract as it is, *more or less*, and such is my price." He adds, "this is perfectly understood by planters and farmers of the lowest order." I cannot but think that the principles to be extracted from this case in *Call.* support the construction which I contend for in the present case. And although I fear that my opinion may be erroneous, since my brethren of the bench do not acquiesce in it, I feel bound to declare it to be my opinion, that, in this case, judgment should be entered for the Plaintiff.

ROBERTS, Indorsee of ELI MOORE, *v.* JOSEPH JONES.

From Hertford.

Set-off. Debts which can be set-off, must be such as are due in the same right; therefore,

Where A. gave his note to *B, administrator of the estate of C.* and B. assigned the note to D, who sued A; A. was not permitted to set-off a note given by B. to E. and by him assigned to A, nor a note given by B. to him.

This was an action of debt, brought upon a note given by the defendant, Joseph Jones, and one Lazarus Carter, for the sum of £18 10*s.* and made payable to "Eli Moore, (354) administrator of the estate of John Anderson, deceased," dated 15th November, 1797, and indorsed in blank with the name "Eli Moore." The Defendant pleaded a set-off, and offered in evidence two notes; one given by the said Eli Moore to Matthias Jones, "or his order," for the sum of forty dollars, dated January 11th, 1798, and indorsed by Matthias Jones to Andrew Jones, on the 3d April, 1799, and by him transferred to the Defendant, Joseph Jones. The other given by the said Eli Moore to the Defendant, Joseph Jones, for the sum of thirty dollars, dated 6th February, 1796. The question submitted to the Supreme Court was, Whether the two last mentioned notes could be given in evidence, and operate as sets-off against the Plaintiff's demand?

LOWRIE, Judge, delivered the opinion of the Court:

The act of 1756, respecting sets-off is copied from the statutes of 2d George 2d, ch. 22, and 8th George 2d, ch. 4. The decisions, therefore, upon those statutes, will be considered as authorities, and aid us in the construction of our act of 1756. The object of this act is to prevent multiplicity of suits. It enacts "that in all cases where there are or shall be mutual debts subsisting between the Plaintiff and Defendant, or if either party sue or be sued, as executor or administrator, &c. where there are mutual debts subsisting between the testator or intestate, and either party, one debt may be set against the other, either by being pleaded in bar or given in evidence on the general issue, on notice given of the particular sum intended to be set-off, and on what account the same is due, notwithstanding such debts shall or may be deemed in Law to be of a different nature," &c. What are and what are not mutual debts, under the statutes of George

2d, have been the subjects of many decisions in the British Courts.

The note on which the present suit is brought, was given by the Defendant to Eli Moore, as administrator of
(355) John Anderson's estate. The note for thirty dollars, offered as a set-off, was given by Eli Moore to the Defendant, and is due and owing from the said Eli Moore, in his individual and private character. Suppose that Eli Moore had brought the suit himself, after the note for thirty dollars, given by him to the Defendant, had become due, and the Defendant, under the plea of set-off, had offered in evidence this note for thirty dollars: Eli Moore must have sued in his character of administrator of Anderson's estate, and the rule would have applied, "that the debts which can be set-off, *must be such as are due in the same* right." Under this rule it has been decided in the case of Paynter *v.* Walker, *Bull. N. P.* 179, that if a husband is sued for his own debt, he cannot set-off the debt due to him in right of his wife. The question in Wood *v.* Akins, 2 *Esp. Rep.* 594, was, whether the debt of the wife, *dum sola*, could be set-off against the demand of the husband in his own right, he not having ordered or directed the debt to be paid, and thereby made it his own debt, subsequent to the marriage; and determined by Eyre, Chief-Justice, that it could not.

By the words "mutual debts subsisting between the testator or intestate and either party," the Court understands that if an executor or administrator were to bring an action in right of his testator or intestate, a debt due and owing from said executor or administrator in his own right to the Defendant, could not be set-off; otherwise the executor would be compelled to pay his own debts with the money of his testator, and thus commit a *devastavit*. If then, Eli Moore himself, had brought this suit in his character of administrator of Anderson's estate, and the Defendant could not have set-off the note for thirty dollars, upon the ground "that the debts were not due and owing in the same right," it necessarily follows, that the note for forty dollars could not be allowed as a set-off; and if neither could be allowed as a set-off against Eli Moore, upon the ground before
(356) stated, it follows that neither can be allowed as a set-off against his indorsee. Judgment for the Plaintiff.

ALSTON AND WIFE *et al.* *v.* BRANCH AND ARRINGTON.

From Halifax.

A. devised all his cash on hand, certificates, stock in trade, &c., also all his estate real, personal, or mixed, not before devised, "to his three illegitimate daughters, B. C. & D., between them and the heirs of their bodies forever: *but if either of the said children should die before they arrive at the age of eighteen years, or marries, then the estate of the one deceased, to be equally divided between the surviving two, to them and the heirs of their bodies forever; and if two of the said children should die, before they arrive at the age of eighteen years or marries, then the portion of the two deceased, shall descend to the surviving one, and the heirs of her body forever; but if all the said daughters should die before they arrive at the age of eighteen years, or marry, and have issue thereby*, then all the cash, certificates, &c., and other property aforesaid, to be equally divided between E. F. G, &c.

D, one of the daughters, intermarried with J. S, and died *after* attaining the age of eighteen years, but without issue.

D's estate became absolute upon her arriving at the age of eighteen years, and upon her death, without issue, did not vest in her surviving sisters.

Cross-remainders between the daughters, are not be raised by implication in this case. And the Court will construe the word *or* as *and* to effectuate the intention of the testator; his intention being, that if either of the daughters should die under the age of eighteen years, unmarried, and without issue, that her estate should go over to her surviving sisters; but if either of them should attain the age of eighteen years, or should marry and have issue, that her estate, before contingent, should become absolute upon the happening of any one of these events.

Micajah Thomas, late of Nash county, deceased, by his last will and testament, devised and bequeathed to his three illegitimate daughters, Mourning, Margaret and Temperance Jackson, certain negro slaves, all his cash on hand, certificates, stock in trade, debts due by bond or other-
(357) wise, and all and every thing else of his estate, real, personal or mixed, not devised or bequeathed to others, and directed the said estate to be equally divided between them, when they should arrive at the age of eighteen years, or marry; "between them and the heirs of their bodies forever: but if either of the said children, Mourning, Margaret and Temperance, should die before they arrive at the age of eighteen years, *or marries*, then and in that case, my will and desire is, that the estate of the one deceased should be equally divided between the surviving two, to them and the heirs of their bodies forever; and if two of the said children should die before they arrive at the age of eighteen years *or marries*, then it is my will, that the portion of the two deceased shall descend to the surviving one, and the heirs of

her body, forever; but if *all* my daughters, Mourning, Margaret and Temperance, should die before they arrive at the age of eighteen years, *or marries and has issue* thereby, then the said negroes, with their increase, money, certificates, stock in trade, and all other property which they are entitled to by this will, shall go to, and be equally divided between, Bennet Boddie, George Boddie, Temperance and Mary Perry, daughters of Nathan Boddie, and my two nieces, Rhody Ricks and Mourning Arrington, to them and their heirs forever."

Mourning, one of the daughters, intermarried with James Branch, and died, after attaining the age of eighteen years, and after having a still-born child. She had no issue born alive. Margaret intermarried with John Alston, and Temperance with James Alston, and the said Alstons and wives filed their bill against James Branch, who survived his wife Mourning, for an account of so much of the estate of the testator, Micajah Thomas, as had been allotted to the said Mourning shortly after her marriage, and as had come to the hands of said Branch: and also against William Arrington, who had been guardian to the said Mourning, to re-

(358) strain him from paying over to Branch such monies, belonging to the estate of the said Mourning, as were then in his hands; and the bill prayed that Branch might be decreed to deliver up to Complainants, the negroes and other estates, and pay over to them such monies as were in his hands, belonging to the estate of the said Mourning.

To this bill the Defendants demurred, and it was submitted to the Supreme Court, Whether the estate vested absolutely in Mourning when she attained eighteen or when she married; or whether it ceased and determined by her death without issue after marriage?

Haywood, for the Complainants, contended, that the testator had two events to guard against; one was, a marriage before eighteen, which, owing to the inexperience of his daughters, might be very imprudent: the other was, the death of his daughters before marriage, or after marriage and before having issue, in which event the whole real estate must escheat to the public: for being illegitimate, the surviving sisters could not inherit the lands, and being married, the sister about to die could not devise them. For the first of these events the testator provided, by saying, that if one

or two of his daughters die before eighteen, the estate shall go over: and marriage and having issue before such death, to-wit, death before eighteen, will not cause the estate to vest absolutely, but upon such death the estate shall go over; and nothing be left for the issue. For the object of the testator was, to prevent the early and imprudent marriages of his daughters, and there is no ground to believe that he intended the estate of the legatee to become indefeasible, unless she attained eighteen, married, and had issue thereby. The plain intent of the testator was, to create cross-remainders amongst the daughters; this intention is not positively expressed, but it is necessarily inferred from the terms of the devise. There is no rule of construction better estab-
(359) lished by authorities than this, that if a testator give property to several persons, and direct that *all* that property shall go over, upon the death of the legatees under certain circumstances, such property shall not go over in parcels, but will remain amongst such of them as survive. So if he directs that it shall go over if all the legatees die under such circumstances, if one or some of them die under them, his or their share or shares will not go over, but will remain with and vest in the survivors, until all die under such circumstances. If these rules of exposition be correct, then, as the estates given to these sisters are in the present case to go over if *all* die after marriage without having issue, the share of one dying thus situated will remain with the surviving sisters; and as *all* the property to which they are entitled by the will is to go over on that event, the share of one who dies after marriage and without having issue, will vest in the survivors, till the event takes place on which *all* the estate is to go over. It remains, then, to be proved, that these are the true rules of construction.

In 4th *Leonard*, 14, 32d Eliz., A. devised a part of his lands to his eldest son in tail, and the other part to his youngest son in tail, and directed that if any of his sons died without issue, then the *whole* land should remain to a stranger in fee, and died. The younger son died without issue, and the stranger entered: and it was adjudged that his entry was not lawful, and that the eldest son should have the land by implicative devise. Another case is reported in *Raymond*, 452, and is stated in *Viner's Ab.* 304, 305. *Pl.* 7. Devise to A. and B., his daughters, and their heirs, equally to be divided; and in case they happen to die without issue, then he devised to

F., a nephew. One of the sisters dies, her part remains to the surviving sisters; and Pemberton, Chief Justice, said, the words "if they die without issue," cannot be construed otherwise; for then he gives *all* his lands to F., which imports that both shall come in at one time; which cannot be, till
(360) both of the daughters are dead without issue, unless by the death of one without issue, the other should lose her moiety, which cannot be thought to be the intention of the devisor. Another case is reported in *Cowper*, 31. Testatrix devised all her undivided moiety to trustees to the use of her husband for life, remainder to her sons to be begotten on her body, and in default of such issue, to the use of all and every the daughter and daughters of P. H. and her the testatrix, lawfully to be begotten, and to the heirs of their body or bodies, if more than one, as tenants in common, and not as joint tenants, *and for* default of such issue, then to the use of her right heir. She died, leaving J. W., her heir at law, and two daughters, Constantia and Catharine. Constantia died at the age of two years, and the question was, Whether on her death without issue, the heir at law was entitled, or whether there were cross-remainders? The Court said, the limitation over is of the *whole* estate, limited to all the daughters, and is to take place on the failure of all and every the daughter and daughters, and the heirs of their body or bodies; and the limitation for default of such issue is to the heir at law. As nothing is to go to the heir whilst any of the daughters or their issue remain, they must amongst themselves take cross-remainders; in other words, the estate of the one dying, went by implication to the survivors. In 4 *Term Rep.* 711, the devise was "to all and every the daughters of the body of my daughter Martha, and the heirs male of the bodies of such daughters, equally between them, if more than one, as tenants in common, and not as joint tenants; and for default of such issue, *all* his said premises unto his right heirs, forever. Lord Mansfield said, in default of issue he gives *all* his said premises unto his right heirs, forever; he clearly intended, therefore, that the *whole* should go together. If no cross-remainders be raised between the daughters, it would go to the right heirs by separate portions, on the death of each. And the Court decided, there were cross-remainders by implication.

The cases cited establish the rule, that a devise
(361) over *of all* upon the event of death after marriage and before issue, will not carry over the estate in parcels; nor will it, on the death of one under such circumstances, take from the others their shares, so as to give the *whole* over: but the share of the one so dying will vest by implication in the two surviving. And if such implication will arise on the devise over of *all*, how much stronger and less liable to doubt, is the case, when that going over is not to be till the death of *all*, &c. The case here is, "if *all* die after marriage and before they *have issue*;" and this of itself is fully sufficient to raise an implication in favor of the survivors. In 2 *Show.* 135, 136, the testator devised to his two daughters, and if *they* die without issue, to B. One of them died without issue; and the Court said, here is a plain intention that B. shall have nothing till both children be dead, and it is such an intention as both nature and prudence direct; and the Court unanimously decided for the surviving daughter. As to the point now under consideration, there is no difference between this case and the one now before the Court, except that in the latter there are three daughters, which at this day makes not the least difference. The doctrine, that there cannot be cross-remainders by necessary implication amongst more than two, is exploded—*Cow.* 31. In 5 *Term* 427, 431, even in the case of a deed, there is a decision against the grantee in the ultimate limitation, because it was only to take place on the death of all the children without issue. In *Cowp.* 79, the devise was to his two brothers and one sister, and the heirs of their bodies lawfully begotten, and for want of such issue, over. Lord Mansfield and Willes, Justice, said, there were but few cases which came before the Court where cross-remainders are not meant by the testator, and they said, want of *issue* there plainly meant issue of *all*, and decided in favor of the survivors. And may it not be said, in the present case, that the testator did not mean that those in the ultimate limitation should take, whilst any daughter lived, or any issue of theirs
(362) existed at the death of a surviving daughter? In the present case, the words are, "if all die not having issue;" in the last case cited, the words were, "and for want of such issue." If the meaning of these words was, for want of *issue of all*, is not the same meaning much more unequivocally expressed in the words, "if all die without issue?"

It follows, then, that on the death of one not having issue, her part is not to go over, but to remain with the others till they, also, die under the prescribed circumstances. It also follows, that the Complainants, being the surviving sisters, are entitled to the share of their deceased sister Mourning, unless the will of the testator making such a disposition be incompatible with the rules of Law.

It is however contended, that the word *or*, used in the devise, was intended by the testator to be used copulatively, and signify *and*, that the devise really means, "die before eighteen, and before marriage, and having issue thereby;" and that therefore, the estate of the legatee would be indefeasible until all the events happened, and the estate would be absolute whenever it became impossible for all of them to happen; as if one arrived at eighteen, or if she married or died without leaving issue; whereas, if the sentence is to be read in the disjunctive, if either event happens, the estate of the legatee determines; that is to say, if either they die before eighteen, or before marriage, or being married, before they have issue thereby. It is true, that there are cases where *or* is to be construed *and*; but they are cases where the meaning of the testator must be evidently disappointed, unless such construction be adopted: as if land be devised to A. *or* his heirs, it is clear that the testator intended a fee to A.; but A. cannot have a fee unless the will be read "to A. *and* his heirs;" the Court will, therefore, so construe it, that the evident intention of the testator may not be defeated. But such constructions are not to be adopted, except in cases of evident necessity, and where the meaning
(363) of the testator indubitably requires it; not where his meaning is doubtful, much less where there is reason to believe that his meaning is expressed and conveyed to us by the disjunctive which he has used. In the present case, there are strong reasons to believe that the testator intended to use the word *or* in the disjunctive; he intended to guard against the imprudent marriages of his daughters before they attained the age of eighteen, and this intention would be entirely defeated if every event mentioned in the will must concur to defeat their estates, that is, dying before eighteen, and before having issue by marriage; which is the consequence of reading *or* for *and*: and notwithstanding the design was to defeat her estate, if one of the daughters married and died under eighteen, yet the very circumstance

of marrying under eighteen, will render it indefeasible. In 12 *Mod.* 276, Jennings devised to his son Thomas, and his heirs forever; "but if it should happen that my said son shall die before he attain the age of twenty-one, *or* without issue of his body lawfully begotten, then my said land shall be divided between my daughters Mary and Elizabeth." Thomas, the devisee, arrived at the age of twenty-one, made his will, and died without issue; and it was insisted for the devisee, that the will of Thomas, the father, should be read thus: "die before twenty-one, *and* without issue;" for said the counsel, otherwise if he have issue before twenty-one, such issue shall not inherit. But Holt, Chief-Justice, answered, there is no necessity to construe *or* as *and*, for it might be the design to hinder him from marrying till his age of twenty-one. In 2 *Ver.* 388, there is another decision of Holt, Chief-Justice, to the like effect. The testator devised a house to his sons James and Thomas; "but if any of my said children shall die before twenty-one, *or* unmarried, his part to go over," &c. Thomas died after twenty-one, but unmarried, and Holt decided, that his share went over. Another reason for not construing *or* as *and*, is this, that if *or* be construed copulatively, and one of the legatees die under eighteen, and also unmarried, and also without issue, the estate will go over; but if she die after eighteen, the estate will have vested in her absolutely. Suppose then, she dies after eighteen, and before marriage, her sisters cannot take the real estate mentioned in this clause of the will, because of their illegitimacy; nor can she devise them to her sisters because of infancy; and they cannot go over to those in remainder, because the estate vested in her absolutely on her attaining the age of eighteen: the consequence is, it must go to the public, for want of an owner, and so must the personal estate also, if she die intestate. Suppose another event, that one of the daughters attain the age of eighteen, and marries and dies without issue, what is to become of the real estate, if her attaining this age vests the estate absolutely in her? It cannot go to the husband as tenant by the curtesy, nor can she devise them to her sisters because of her coverture, nor can the estate descend to them because of their illegitimacy. Now the testator did consider of this event, for he has expressed the case of death before marriage and having issue thereby, which certainly means death, without issue, after being married. If he meant that

(364)

the estate should not be defeated, unless the legatee died both under eighteen and unmarried, and consequently that marriage before eighteen, should render it absolute in the legatee, then he must have meant to leave the cases of death after eighteen, and before marriage, and death after marriage, and without issue, wholly unprovided for. And are we, against the plain words of a will, which amply provide against such consequences, if understood in their natural and common sense, to presume, that the testator did not understand what he said, to substitute one word for another, and so to let in all the evils which they are calculated to repress?

As to the cases in which *or* has been construed as *and*, some of them have been exploded, and those which remain, are clearly distinguishable from this case by this plain circumstance, that there was no perceptible or proba-
(365) ble intent of the testator to be disappointed by such construction, nor any inconvenience to be incurred thereby. Whereas, in the present case, the real estate mentioned in this clause of the will, will be exposed to escheat, and the personal estate also, in case of intestacy, and a plain and perceptible intent of great moment defeated, if such construction prevail. The case of Soule and Gerard, *Cro. El.* 525, was thus: the testator having four sons, devised to his son Richard and his heirs forever; and if he died within the age of twenty-one, or without issue, the land to be equally divided between his other three sons. Richard, the devisee, had issue Mary, and died before coming to the age of twenty-one; and the Court decided that Richard had an estate-tail; whereas the construction now contended for by the Defendants, would have given a fee, determinable on the contingency of death before twenty-one, and without issue. This case, however, is denied to be law, by Holt, Chief Justice, in 12 *Mod.* 277. And in 2 *Vern.* 377, there is a case cited, where, upon a special verdict, it was determined upon the same words, that if the son die before twenty-one, although he leave issue, that issue shall not take; which is to read the will as it stands. In 3 *Atk.* 194, Walsh *v.* Peterson, the testator gave to his son Matthew an estate in fee; "but in case he shall happen to die before he shall attain the age of twenty-one, *or* without issue, then over." The son died after twenty-one, and without issue; and it was decided that the estate did not go over, because both contingencies did not happen, which

is tantamount to saying, he must die before twenty-one, and before he has issue. The devisee was an only son, and there was nothing in the will, nor in the circumstances of the devisee, to obviate the presumption that the testator did not mean to leave the issue born before twenty-one, without provision. In the case cited, if the issue did not take, the estate would have gone to strangers from the blood of the
(366) testator, which no doubt, strengthened the presumption; but in the present case, if the issue born before eighteen shall not take, the estate will go to the two surviving daughters of the testator. In 3 *Atk.* 390, the testator gave to his son A. in fee, "and in case he shall happen to die in his minority, and unmarried, *or* without issue, then over." The devisee came of age and married, but died without issue; and the Court decided that the estate did not go over, because he did not die under age and unmarried, nor unmarried and without issue. Here, by the words of the will, two circumstances in the conjunctive were to concur, death under twenty-one and being unmarried, and no change necessary. Next came the words, *or without issue;* and they were construed to mean, *or death without issue under twenty-one.* They were not construed to mean three concurring contingencies, death under twenty-one, unmarried, and without issue. So it is no precedent for changing *or* into *and:* and the Court said it was no way like the case of Soule and Gerard, which is the leading *case,* and always cited upon such occasions. Another case is in 2 *Strat.* 1175, "I give, &c. to my grandson in fee, but in case he dies before he attains the age of twenty-one, or marriage and without issue, then over." The devisee attained twenty-one, and died unmarried: the Court said, they would read the will, "if he died under twenty-one, unmarried, and without issue." The Court did not go upon the ground, that the issue born before twenty-one, would, without this construction, be disinherited; but inclined to this construction, as the contingency was in defeasance of an estate: and there does not appear to be a single case, save that in 3 *Atk.* 194, where the Court adopted the construction upon the ground that otherwise the issue born before twenty-one, would be disinherited; and in the case in *Atk.* the intent in their favour could not be mistaken. The last case in 3 *T. Rep.* 470—in that case, if the Court had not construed *or*

as *and*, either a life-estate given in the same instru-
(367) ment, would have been defeated, or the estate in remainder must have been void: so there was an absolute necessity, thus to construe the instrument.

From these views of the case, the conclusions are, that the estate is to go over to the ultimate devisee, not before all the daughters die before eighteen, or before leaving issue by marriage; that if one dies before having issue by marriage, her part goes over to her surviving sisters, by a necessary implication in the will, arising from the words "if all die, then all the estate to go over." And such disposition being to take place in a reasonable time, is a legal one; and that there is nothing to hinder the surviving sisters from taking, according to the intent of the testator.

Browne, for the Defendants.—In the construction of every will, the principal thing to be considered is, the intention of the testator, and when that is ascertained, it must be carried into effect, if consistent with the rules of Law. This intention is to be ascertained from the words which the testator makes use of, and the circumstances of himself and the legatees, as far as they are disclosed to the Court, either expressly or by fair implication. The only circumstance expressly stated in the bill is, that the first legatees were the infant illegitimate daughters of the testator. From the considerable specific legacies devised to these illegitimate children; from their being made residuary legatees, and from other children not being mentioned even as ulterior devisees, it may be fairly implied, that he had no legitimate children. From his mentioning the two eldest of these daughters coming of age at the same time, it will follow that they were twins; and from the ulterior devisees not being of his name, or mentioned by any term of relationship, it may reasonably be presumed, that they were strangers to his blood and family.

The object to be avoided would be, the chance of the
(368) property's vesting in the State, by one or more of the legatees dying before any one should be capable of taking it under the statute of distributions, or the legatee herself should be of sufficient age to dispose of it by will. This risk would be sufficiently guarded against, by devising it over in case one or more of them died before she or they either married or attained eighteen years of age; for if one of them married, then her property would vest in her hus-

band; or, if one of them attained eighteen years of age, then she might certainly devise it, although it be doubtful whether she could do it before. Swimb. 67. Co. Lit. 89, b.

Supposing these to be the probable objects and intentions of the testator, we will proceed to an examination of that clause of his will set forth in the Complainants' bill. In the first part of that clause, the property now in question being personal estate, is absolutely bequeathed to his three daughters, to be equally divided between them when the two eldest (twins) arrive at the age of eighteen, or marry, (whichever event first happens.) "But if either of the said children, Mourning Thomas, Margaret Thomas, and Temperance Thomas Jackson, should die *before they arrive at the age of eighteen years, or marry,* then, &c. But if *all* my daughters, &c. should die *before they arrive at the age of eighteen years, or marries,* and has issue thereby, then, &c." If the testator had stopped at the devise over to the survivors in case of one dying before she arrived at the age of eighteen years, or married, then, unquestionably, the devise over could not have taken effect: for Mourning both arrived at the age of eighteen years and married. But it is said, that the *whole* being devised over in case of *all* dying before they arrive at the age of eighteen years, or marry and have issue thereby, shews that the testator intended that if all his daughters died before they arrived at eighteen years of age, or before they married and had issue thereby, the whole should go over

(369) to Benbett Boddie, &c.—and also intended that the whole should be kept together until it should be ascertained whether that event should happen or not; and that cross-remainders between the daughters were thus raised by implication, to take effect if any one or two of them died either under eighteen years of age, or before being married and having issue thereby. On this position the argument for the Complainant seems to rest; and to this it is answered,

1st. That even if the contingency on which the estate is devised over to Bennett Boddie, &c. is such as Complainants contend for, still cross-remainders between the daughters could not be raised by implication; and

2dly. That the contingency on which the estate is devised over to Bennett Boddie, &c. is not such as they contend for.

As to the first point, it may be admitted that the general position laid down for Complainants concerning raising cross-remainders is correct; and also that the law is now settled

"that where cross-remainders are to be raised by implication between *two* and no more, the presumption is in favor of cross-remainders: Where they are to be between *more than two*, there the presumption is raised against cross-remainders: but that presumption may be answered by circumstances of plain and manifest intention either way." Cowp. 720. But the cases of cross-remainders to be met with in the books, are where property has been devised to two or more as tenants in common for a limited time, as for life, or in tail, without any *express* remainder between them, and then on the death of *all*, or the failure of issue of *all*, the *whole* is devised over. In these cases it has been held, that when the estate of one of the first devisees hath been clearly spent, by his death, or the extinction of his issue, then the survivor or survivors, or his or their issue, should take by cross-remainders, by (370) implication. But here there is an *express* cross-remainder between the first devisees. The testator hath expressly and explicitly set down on what contingency or contingencies the surviving daughter or daughters were to take; and as neither of these contingencies have happened, they cannot take at all: For in such a case, the Court cannot raise any cross-remainders by implication. Dyer 330—Calche's case. Then the event on which the devise to the first devisee was to cease had clearly happened, and the cross-remainder by implication was to be raised between *two*, where the presumption is in favor of them. In the case before the Court, it cannot be said that the event on which the devise to Mourning was to cease has *clearly* happened; and the cross-remainder by implication is to be raised between *three*, where the presumption is *against* them. The general application and force of the maxim of law, which governed in the case just cited, and ought to govern in this, is attested by there being two modes of expressing it. "*Expressio unius est exclusio alterius.*" "*Expressum semper facit cessare tacitum.*"

As to the second point, it is insisted that the contingency on which the devise over to Bennett Boddie, &c. was to take place, is not such as is contended for on behalf of the Complainants; but that the words "if all my daughters should die before they arrive at the age of eighteen years, or marries and has issue thereby," are to be taken copulatively; that is, that the daughters must die both before they arrive at the age of eighteen years, and before they marry and have issue thereby; that if they either arrive at the age of eighteen

years, or marry, and had issue thereby, the property was to be absolutly vested in them, and not to go over.

The testator had, in the first part of the clause, directed that the property devised to his daughters should be kept together until the two eldest (twins) should arrive at
(371) the age of eighteen years or married. What could induce him to do this? Not because at the age of eighteen years, they were capable of managing their estates; for the will does not provide for that, nor does the general rule of the law permit it; but because, when they arrived at the age of eighteen years or married, an important change took place in the interest which they had in the property. Their interest in it then became absolute, whereas, before it had been liable to be defeated by their death. Until one of these events happened, it could not be *certainly* known to whom the property would ultimately belong, or how it would have to be divided. If one of them died before she arrived at the age of eighteen years or married, then it was to be equally divided between the survivors: if two of them should die so, then there would be no division at all, because the whole would belong to the survivor; and if all three should die so, then it was to be divided between Bennett Boddie, &c. The first direction of the testator, concerning the division of the estate, was to be carried into effect when they arrived at the age of eighteen years or married, whichever first happened; and in the remaining part of the clause he uses the same words, "arrive at the age of eighteen years, or marries and has issue thereby," no doubt, with the same intent. They were to have a division made to them, if they arrived at the age of eighteen years or married, and they were to have the absolute property, if they did either the one or the other. And the words of the will, by a very easy reading, will support this construction: "but if all my daughters should die before they (*either*) arrive at the age of eighteen years, or marries and have issue thereby." If we extend it to the negative implied, it would be, "but if all my daughters should not die before they arrive at the age of eighteen years, or marry and have issue thereby, then the said property shall belong to them, and not to Bennett Boddie, &c." It is worthy of remark, that the words here used, are in substance the same as the directions given by Sir
(372) Joseph Jekyll, Master of the Rolls, in Read *v.* Snell, 2 Atk. 643; and whether these are the words of the

directions, or only the substance of them given by the reporter, either would probably be more accurate than this testator; and yet it is manifest that the daughter or daughters were to have the property absolutely, if she or they, *either* attained the age of twenty-one years or married.

The Complainants' counsel contend, that the words, "die before they arrive at the age of eighteen years, or marry and have issue thereby," are to be taken disjunctively; that is, that these are two separate and distinct contingencies; that on the happening of the one or the other, the devise over is to take effect, although the other do not happen. If this construction were to prevail, the issue of the daughters, the principal objec s of the testator's affection and bounty, might be disinherited; for one or all of the daughters might marry, have issue and die before eighteen years of age, and if the property is to go over because they had no issue, although they attained eighteen years of age and married, so it must go over because they did not attain eighteen years of age, although they married and had issue, which certainly could not be the intention of the testator. A multitude of cases might be cited to shew that even in deeds, the Court, in order to effectuate the intent of the parties, will change the disjunctive *or* into the copulative *and*. 1 Vern, 42; 1 Leon., 70: Pollex., 645; Plow., 286, 289, &c. The same has been done in construing statutes, notwithstanding the deliberate and formal manner of their passing, and the scrupulousness with which their wording is considered. 3 Co., 39, a. So in all formal conveyances, "to have and to hold unto the said A. B. his heirs *and* assigns," or "unto the said A. B. his executors, administrators *and* assigns." Such cases, however, need not be resorted to, as the Books furnish a long series of decisions exactly in point, and which establish be-
(373) yond all contradiction the construction contended for by the Defendants.

In 1596, in Soulle *v.* Gerard, (Cro. El. 525, Moore 22,) the testator having four sons, devised his land to his "son Richard and his heirs forever; and if Richard died within the age of twenty-one years, *or* without issue, that then the land should be equally divided between his three other sons." Richard had issue, Mary, and died within age. The Court decided that Mary, the daughter of Richard, should have the land, and that the devise over could not take effect unless Richard had died under twenty-one years of age and without

issue. Thus changing *or* into *and* in order to effectuate the intent of the testator, who certainly could not mean to disinherit his grandchild. It is worthy of remark, that in this case the devise over is to the testator's other sons; in the case before the Court, it is to strangers.

In 1708, in Wright *v.* Hammond, (1 Stra. 427,) the devise was to the testator's daughter "Elizabeth, but if my said daughter Elizabeth should die before her mother *or* without heirs," then over. Elizabeth, the daughter, outlived her mother, but died without issue. Pratt, Chief-Justice, in delivering the opinion of the Court, says, "the contingencies on which the devise over was to take effect, never happened, for the daughter did not die before the mother." From which it appears that the opinion of the Court was, that *or* should be changed into *and*. Why? Because, if the estate was to go over because Elizabeth the daughter had not issue, although she outlived her mother, so it must have gone over, if she did not outlive her mother, although she had died leaving issue, which never could have been the intention of the testator. Therefore the Court held, that her dying before her mother, *or* without heirs, did not constitute two separate and distinct contingencies, on the happening of either of which the estate should go over, but that these words made only one contingency, and that the estate
(374) should not go over unless she died both before her mother *and* without heirs.

In 1743, in Read *v.* Snell, (2 Atk 647,) Lord Hardwicke, after shewing that there are many cases where *or* may be construed *and*, says, "And there is one case in this very will where it *must* be so construed, and that is in the second codicil, where she gives her wearing apparel to her maid, in case her daughter dies under age or unmarried."

In 1743, Barker *v.* Suretees, (2 Stra. 1175,) on a writ of error, the question arose upon these words in a will, "I give the said premises to my grandson, his heirs and assigns forever; but in case he dies before he attains the age of twenty-one years *or* marriage and without issue," then over. The grandson attained twenty-one years of age, but died without ever having been married. The Court gave judgment against the ulterior devisee, and said they would read the will without the word *or*, as if it run, "and if he dies before twenty-one, unmarried and without issue." The reason assigned in support of the last decision upholds this also; and the limita-

tion or contingency in this case, is the very same as in the case before the Court.

In 1774, Walch *v.* Patterson, (3 Atk. 193,) the testator devised to his son Matthew and his heirs and assigns forever, "But in case my said son should die before he attain the age of twenty-one years *or* without issue," then to his the testator's wife. Matthew died after the age of twenty-one years, but without issue, and the question was, "Whether the devise over to his mother should take effect upon the happening of one of the contingencies only:" and Lord Hardwicke held it to be a very plain case, that it should not. In this case the devise over was to the mother of Matthew, who, it might have been reasonably supposed, would have provided for her children, (her own as well as the testator's grandchildren,) in case they had been disinherited by the literal construction for which the Complainants now (375) contend; which makes it a stronger case than the one now before the Court, where the devise over is to strangers.

In 1746, Frammingham *v.* Brand, 3 Atk. 390; 1 Will. 140, testatrix devised to her son Robert and his heirs forever; "and in case the said Robert my son happen to die in his minority, *or* unmarried, *or* without issue, then I give it to my son Henry and his heirs." Robert attained the age of twenty-one years, but died unmarried and without issue. The Lord Chancellor held, "that this contingent executory devise to Henry could never take place, for both the words *or* are to be taken in a copulative sense, and unless Robert had died in his minority *and* unmarried *and* without issue, Henry could never take: and if this were to be construed otherwise, it might happen that Robert might marry and die leaving issue in his minority, *which* might be disinherited if the estate was not to vest in him absolutely on his marriage, which could never be the intent of the testator."

In 1750, in Brownsword *v.* Edwards, 2 Ves. 249, Lord Hardwicke again very emphatically recognizes the same doctrine.

In 1789, Wright *v.* Kemp, 3 Term Rep. 470, in the surrender of copy-hold premises, the use was to William Wallace for life, and from and after his decease, to the use of the heirs of his body lawfully to be begotten," with a proviso, "that in case William Wallace should die in the life-time of the surrenderor, *or* without issue of his body, then to the right heirs of the surrenderor." William Wallace died in the life-time

of the surrenderor, leaving issue. The counsel on both sides refined much, but the good sense of Lord Kenyon and the rest of the Court, contemned all refinement, and founded themselves on the intention of the surrenderor in favor of the issue of William Wallace, and therefore changed *or* into *and*, so as to vest the estate in the issue of William Wallace.

In addition to these authorities, one may be cited (376) from the opinion of the Court of Errors and Appeals of the State of Virginia, delivered in 1798, in the case of Brewer and wife *v.* Opie, 1 Call. 212. There the devise was to "the testator's son Joseph, his whole and sole estate, real and personal, and in case my said son should die before the age of twenty-one years, *or* without lawful heirs," then over. The opinion of the Court was, "that Joseph the son took a contingent fee, to become absolute upon either event happening; that is to say, his coming of age, or having a child born, or leaving one at his death, no matter which. That *or*, in this will, is to be taken copulatively, so as to require the happening of both contingencies to entitle those in remainder."

The counsel for Complainants have attempted to question the decision in the case of Soulle *v.* Gerard, Cro. Eliz. 525. In that case, the first devise was to the testator's son Richard, in fee, and if he died within the age of twenty-one years *or* without issue, then over: And some of the Judges said that Richard took an estate tail, and that the devise over was a remainder. Since the doctrine of executory devises hath been better understood, this position hath been doubted, and it would probably now be decided that Richard took a defeasible fee, to become absolute on either event happening, and that the devise over was a contingent executory devise (3 Atk. 390; 2 Ves. 249; 1 Call. 212), but the propriety of the decision hath never been questioned. All the cases cited for the Defendants are in conformity with it.

The counsel for Complainants have relied much upon a case reported in 12 *Mod.* 276, and a case *cited* in 2 *Vern.* 377. In truth, the case in 12 *Mod.* and the case cited in *Vernon*, are one and the same case, as appears from the names of the parties, although in 2 *Vern.* it is misstated either by the citer or reporter. The name of this case is Hilliard *v.* Jennings, and it is reported in 12 *Mod.* 276, *Com.* 90, *Freem.* (377) 509, *Lord Raym.* 505, and *Carth.* 514. (which last is considered as the best:) (1 Bl. Rep. 101) and in it

the testator devised the lands in question to his son Thomas and his heirs forever. "But if it shall so happen that my said son shall die without issue of his body *or* before he shall attain the age of twenty-one years," then over to his, the testator's, two daughters. Thomas having attained the age of twenty-one years, made his will in due form of law, and devised those lands to the Plaintiff, who, together with A. B. were subscribing witnesses to said will, and then Thomas died without issue. All this being found by special verdict, two questions arose, 1st, Whether the said will was duly attested under the statute of frauds: and 2dly, Whether the absolute fee-simple was vested in Thomas by his arriving at twenty-one years of age. The Court gave judgment for the Defendant on the first point, as appears from *Carthew*, who does not even take notice of the loose conversation of Lord Holt, on which the defendants so much rely, but only reports the other point. 12 *Mod.* also shews, that the cause was decided about the attestation of the will; and it appears from *Ld. Raym.* 505—1 *P. Wms.* 557—1 *Bl. Rep.* 101, that the Court did not determine the other point. Also, Powell, Justice, four years afterwards, 2 *Vern.* 377, cites the case of Soulle *v.* Gerard, as good law, which he could not have done, if it had been overruled in the case of Hilliard *v.* Jennings. So Pratt, Chief-Justice, who argued the case of Hilliard *v.* Jennings for the devisee, more than nine years afterwards, in 1 *Strange* 427, delivers the same doctrine as that laid down in Soulle *v.* Gerard, without taking any notice of the case of Hilliard *v.* Jennings. Nor has it ever been cited as an authority affecting the point now before the Court, in any of the numerous cases determined since it occurred.

The case of Woodward *v.* Glassbrook (2 Vern. 388), has been cited for the Complainants. That case in substance was, that the testator devised to his son Thomas *in* (378) *tail*, but if Thomas should die before twenty-one years of age, *or* unmarried, then over. Thomas died unmarried, but after he attained twenty-one years of age; and it was decided that the devise over should take effect. Neither the arguments of counsel, nor the reasons for the opinion of the Court are given. This is a solitary case decided by one Judge at *Nisi Prius*, and reported by a gentleman in a great practice, who took notes only for his own use, which were published, perhaps imprudently, after his death. They are frequently found to be very incorrect; but if this case be cor-

rectly reported, we can only say, that the decisions for a century before, and for a century since, have been uniformly in opposition to it; nor has it ever been cited or relied on in any of the cases on this subject, which have constantly overruled it.

TAYLOR, Judge, delivered the opinion of the Court:

The testator's intention appears to have been, that as his daughters attained the age of eighteen years or married, their shares of his estate, which, before those events happened, were contingent, should become absolute. A literal construction of the will would not effectuate this intention; for then, a dying under eighteen years of age, although the daughter was married, or a dying without marriage, although she had attained the age of eighteen years, would give her share over to the survivors. If the word *or* is construed copulatively, then the survivors can claim the shares of the deceased only upon the event of her having died unmarried and under eighteen. But Mourning having reached the age of eighteen, and having also married, there is not the least right in the Complainants. To shew that the will ought to be thus construed, the cases cited in the case of Dickenson and others *v.* Jordan and Blount, decided at this term, clearly prove. Another clause of the will provides, that in the event of the death of his daughters under the age of eighteen (379) years, or marriage and having issue thereby, the estate shall go over to some other persons therein named. It is certainly a sound rule of construction, that every part of a will shall be taken into view, in order to ascertain the design of the maker; and this clause seems to shew more clearly, that the intention of the testator would not be accomplished by adopting the construction contended for by the Complainants; for then the claim of the issue of a daughter dying under eighteen might have been defeated, which cannot be thought to have been wished or contemplated by the testator, who has called distant relations into the sphere of his bounty, only upon a total failure of all those circumstances, upon the happening of which, he meant the shares of his daughters respectively to rest so as to become absolute.

In borrowing light from the clause of the will, we must keep in mind this important fact, that the same construction which would entitle the Complainants to their deceased sis-

ter's share of the estate, must be equally operative to transfer their own shares to the ulterior legatees. The Court cannot now decree in favour of the Complainants, on the ground of Mourning having died without issue, and hereafter refuse to sustain a bill in favour of the rest of the legatees, in the event of the Complainants dying without issue. Moreover, if the Complainants had died under the age of eighteen years, leaving issue, the same construction must have taken the estate from that issue and given it to these distant relations, if they are relations at all; for it does not appear that more than two of them are connected with the testator. Upon the whole, the Court are of opinion, that the occurrence of either event, to-wit, attaining the age of eighteen years, marriage and having issue thereby, was sufficient to vest the shares absolutely in the daughters; and that consequently nothing short of the failure of all these events would vest the share of a deceased daughter in the survivors, or in the residuary legatees upon the death of the daughters. Let the demurrer be sustained.

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(380)

Den on Demise of DICKENSON *et al. v.* JORDAN AND BLOUNT.

A. devises to his grandson B. a tract of land, "and in case B. died before he arrived at lawful age, or leaving no issue, then to his grandson C." B. arrived at full age, but died without issue. B. took a contingent fee under this devise, which became absolute upon the arrival of B. to full age;" and the Court will construe the word *or* as *and*, to effectuate the intention of the testator; it being his intention that the estate should become absolute in B. upon B's having issue, or arriving at full age.

Ejectment for lands in the county of Pitt. Special verdict. The facts disclosed in the special verdict were, that William Spier, late of Pitt county, being seised in fee of the lands described in the Plaintiff's declaration, made and published his last will, duly executed to pass lands, and bearing date the 10th day of November, 1780: he therein devised the said land "to his grandson, William S. Stewart, and his heirs or assigns forever;" and by a codicil to his will, duly executed to pass lands, bearing date the 5th day of June, 1781, further devised, "that in case his grandson, William S. Stewart died

before he arrived at lawful age, or leaving no issue, then he gave the lands devised to William S. Stewart, to his grandson, John Spier, his heirs or assigns forever." That the said William Spier afterwards died, without having revoked or altered said will, and upon his death, the said William Spier Stewart, by virtue of said devise, entered into the premises, and was thereof seised: that the said William S. Stewart arrived at full age, but died without issue in the year 1799, leaving the said John Spier him surviving, and having previously published in writing his last will, duly executed to pass lands, and therein devised his interest and estate in the premises, to his brother, James Stewart, who afterwards died intestate, leaving the lessors of the Plaintiff his heirs at law. The Jury prayed the advice of the Court in the premises, and if the Court should be of opinion that the lands
(381) by virtue of the limitation aforesaid, passed to the said John Spier upon the death of William Spier Stewart without issue, but after his attaining his full age, they found for the Defendant: otherwise for the Plaintiff. The case was sent to this Court from the Superior Court of Law for Pitt county, and was argued by

Gaston, for the lessors of the Plaintiff. The testator selected William S. Stewart, his grandson, as the principal object of his bounty, and intended that if he left issue, or arrived at full age, when he could act for himself and dispose of his property, he should have the lands devised absolutely. The will gave him an estate in fee: this would enable him to convey at the age of twenty-one years: if he died under that age, the lands would descend to his issue, or if he left no issue, to his collateral heirs. In the codicil, the testator selects a second object of his bounty, in the event of the first not living to full age when he could enjoy it, and leaving no descendants. It cannot be supposed that he intended to disinherit the issue of William S. Stewart, if he died under twenty-one years of age. The Court will therefore give such a construction to the will as will effectuate the intention of the testator, and this can be done only by construing the word "*or*," in the codicil, as "*and*." In numerous cases heretofore decided, this construction has been adopted. Cro. Eliz. 525. Moore 422. 3 Atk. 193. Pollex. 645. 2 Stra. 1175. 3 Term Rep. 474. 2 Roper 298. And it is worthy of remark, that if the will be not so construed, the devise to

John Spier cannot take effect as an executory devise. 2 Fearne 116, 195–6–7. 1 P. Wms. 667, recognized in 3 Atk. 288. 2 Ves. 606, 180, 125. Com. Rep. 373. Cowp. 410. 6 Term Rep. 314. 7 Id. 589.

TAYLOR, Judge, delivered the opinion of the Court:

By the will of William Spier, an absolute fee simple is given to his grandson, William S. Stewart; by the codicil, this is converted into a contingent fee, which is to (382) pass to the testator's other grandson, John Spier, in the event of the first devisee's dying under age *or* without leaving issue. According to a literal construction of the will, the occurrence of either event would vest the estate in John Spier; but it is evident that such was not the testator's intention, and this intention ought always to be effectuated, when it does not contravene the rules of Law. He could not have intended that the issue of William Spier Stewart should be deprived of the estate, if their father died under age; for that would operate to take all from those who appear to have been the principal objects of his bounty; yet such would be the effect of a literal interpretation of his will. His intention seems to have been, that the fee should remain absolute in William S. Stewart on the happening of either event, either his leaving issue or attaining to lawful age; or, in other words, that both contingencies, to-wit, his dying under age, and without leaving issue, should happen, before the estate vested in John Spier. To give effect to this intention, it is necessary to construe the disjunctive *or*, copulatively; and there are various, clear and direct authorities, which place the power of the Court to do this, beyond all doubt. Only a few of those cases need be cited. Soulle *v.* Gerard, (1 Cro. 525,) was a devise to one of four sons, and his heirs forever, and if he died within age, *or* without issue, to his three other sons jointly. The devisee had issue a daughter, and died within age, and it was adjudged that he took an estate-tail. In the case of Wright *v.* Kemp, (3 Term Rep. 470,) Lord Kenyon thus expresses himself: "There is no doubt of the intention of the parties, and where sense requires it, there are many cases to shew that we may construe the word *or* into *and*, and *and* into *or*—2 *Stra.* 1175, 3 *Atk.* 390—in order to effectuate the intention of the parties. Hence, therefore, in order to give effect to the intention of the surrenderor, we must say, that when he used the word *or* he meant

and: and there is no case where any difference has
(383) been made between a will and a deed, where the Court
are considering how the intention of the parties can
be effected."

A. being seised of lands holden upon leases for lives, devised to B, his brother, all his real and freehold estates, subject to an annuity to his mother for her life; but in case B. should die before he attained the age of twenty-one years, *or* without issue living at his death, to his mother forever. A. died, B. attained the age of twenty-one years, and then died without issue. It was held, that the word *or*, in the devise over, must be construed as *and*, and that the mother took nothing upon the death of B. 5 Bosan. & Pul., 37.

In examining the many cases upon this subject, the point will be found to be completely settled. It is therefore unneccessary to multiply authorities: it is clear upon principle and precedent, and we have no hesitation in saying that judgment ought to be rendered for the Plaintiff.

FREDERICK WHITEHURST *et al. v.* the Executors of ENOCH PRITCHARD, deceased.

A. devised all the residue of his estate to be "*equally divided between B, C, D. E's heirs and F.*" The distribution is to be made *per capita*, and each of E's children take an equal share with B. and the other legatees.

This was a petition brought in Camden County Court by Frederick Whitehurst and others, children of Elizabeth Whitehurst, deceased, against Jeremiah Bright and Timothy Cartwright, executors of the last will of Enoch Pritchard, deceased, for a legacy, which the petitioners claimed under
said will. The testator, after devising his tract of
(384) land whereon he lived, to his wife, and bequeathing
one negro slave to his wife, and another to Jeremiah
Pritchard, devised "all the remaining part of his estate within doors and without, to be equally divided between Hugh Pritchard, Benjamin Pritchard, Lydia Taylor, Elizabeth Whitehurst's heirs, and Jeremiah Bright, to them and their heirs forever." The petitioners contended that the residuary part of the estate was to be distributed *per capita*, and each of them entitled to a twelfth part thereof. The

executors insisted that the residuary part of the estate was to be distributed *per stirpes*, and that the petitioners were jointly entitled to one-fifth thereof. The County Court were of opinion, that the residuary part of the estate should be divided into five equal parts, and that the petitioners were entitled to one of these parts to be equally divided among them. A decree was entered accordingly, from which the petitioners appealed to the Superior Court; and the case coming on to be heard before his honor Judge TAYLOR, he gave judgment for the petitioners; but at the request of the Defendants' counsel, ordered the case to be sent to this Court for the opinion of all the Judges thereon.

TAYLOR, Judge, delivered the opinion of the Court:

There are no expressions in the will from which an inference can be drawn, that the testator intended the division should be *per stirpes:* on the contrary, he uses the word "*equally*," which plainly excludes such a construction. Thomas *v* Hole, Cases Temp. Tal., 251. But independently of this, there are some cases which bear directly in point on the general principle, and which cannot be distinguished from the case at bar. A. devised his freehold estates to trustees in trust, to sell and divide the money *equally* between R. S, J. S, and the children of M. P. M. P. had three children living at A's death, and the question was, Whether the children should take *per stirpes*, in which case the money would be divisible into three parts, to one of which (385) the children would be entitled; or whether they should take *per capita*, in which event the fund would be divided into five parts, and each of the children be entitled to a share in its own right. The chancellor decreed that the distribution was to be made *per capita*. Butler *v.* Stratton, 3 Bro. Ch. Cases, 367. In the case cited, the word "children" is used, in which respect alone it differs from the case before us: but that is a mere verbal difference, which makes none in principle or the rule of adjudication. For the word "heirs" has been considered synonymous with "children," where there are any competent to take as such (Loveday *v.* Hopkins, Amb. 273); and when applied by testament to personal property, must be understood to mean "next of kin," as they are the only persons designated by law to succeed to that kind of estate. 5 Ves. jun. 399. The other authorities which relate to the principal point are, Blackler *v.* Webb, 2

P. Wms. 383; Weld *v.* Bradbury, 2 *Vern.* 705; Northey *v.* Strange, 1 *P. Wms.* 340; Wicker *v.* Mitford, *Harg. Law Tracts* 513. An idea was adopted in the argument of this cause, that the statute of distributions must be resorted to, in order to fix the construction of the will; but there is no authority for such a position. It is true, that the statute of distributions, does, in many cases, furnish the rule as to the object of the bequest, whereby we are enabled to ascertain who shall take under the designation used in the testament; but the proportion in which they shall take, must necessarily be established from a just construction of the will. We are of opinion, that the distribution must be made *per capita*, and consequently, that each of the petitioners must share equally with the other legatees.

LOWRIE, *Judge, contra.*—Obliged, as I am, to differ (386) in opinion from my brethren, it affords me great consolation that if I should be wrong, my opinion in this case will not change the law, nor alter the decision of the Courts. The rule of law, in all cases of this kind, is founded in good sense: it is that all wills must have an interpretation as near to the mind and intent of the testator as may be. "*Quod ultima voluntas testatoris per implenda est, secundum veram intentionem.*" Such construction shall be made of the words of the testator as will satisfy the intention when consistent with the rules of law, and they shall be placed in such order that the intention may be fulfilled. So anxious are Courts of Justice to arrive at the intention of testators in all cases, that they have sometimes, in cases of ambiguity, travelled out of the will in search of facts, from the knowledge of which they might the better be enabled to arrive at the intention of the maker. No case can be found in which the intention of the testator has not governed the decision of the Court, where that intention could be discovered, and the decision, in conformity thereto, could be made without contravening any known rule of law.

In the case before us, the testator gives the residue of his estate "to be equally divided between Hugh Pritchard, Benjamin Pritchard, Lydia Taylor, Elizabeth Whitehurst's heirs, and Jeremiah Bright," I am here obliged to understand the testator as speaking of the heirs of Elizabeth Whitehurst, as representing her in his mind, and in justice entitled only to such part of the residue of his estate, as Elizabeth, had she

been living, would have been entitled to; that is, to as much as was devised to Hugh Pritchard, or any other of the legatees. Had he not intended then to stand in the place of their mother, he certainly would have named them individually, as she did the other legatees. Had Elizabeth Whitehurst been living, he would, in all probability, have devised to her as much, and no more, than he gave to Lydia Taylor.

As far as I have been able to understand the rea-
(387) sons upon which the decision of the Court in this case has gone, they are grounded upon the case of Blackler *v.* Webb and others, 2 *P. Wms.* 383, and the case of Thomas *v.* Hole, *Cas. Temp. Talb.* 251. In the case of Blackler *v.* Webb, the devise was "of the surplus of the testator's personal estate, equally, to his son James, to his son Peter's children, to his daughter Traverse, and to his daughter Webb's children, and his daughter Man. In this case, the Lord Chancellor at first inclined to the opinion that the grandchildren should take *per stirpes* only; and the reason why he did not finally so decide, is given in his own words: "That the grandchildren could not take according to the statute, or in allusion thereto, for as much as the testator's daughter *Webb* was living, and so her children could not represent her." The Lord Chancellor indeed added, that to decree the grandchildren should take *per stirpes*, would be going too much out of the words of the will, and where, too, the meaning of the testater might be according to the words. It also appeared in this case, that the husband of Mrs. Webb was very poor, and had been twice a bankrupt: that from the words of the will it appeared the testator did not intend Mrs. Webb to have the benefit of the devise, and it might be reasonably supposed the testator intended a provision for his grandchildren, such as their parents were unable to make for them. But in this case, the Lord Chancellor was governed by the intention of the testator, as far as the same was consistent with the rules of Law, and could be collected from the words of the will, and all the circumstances of the parties concerned. In the case before the Court, neither of the circumstances that finally governed the decision of the Lord Chancellor exist. The father here does not appear to have been in indigent circumstances and unable to provide for his children, and the mother was dead, so that they could represent her, and could well take in allusion to the statute of distributions.

The case of Thomas *v.* Hole, was a devise of five
(388) hundred pounds "to the relations of Elizabeth Hole, to be divided equally between them." Mrs. Hole, at the death of the testator, had two brothers living, and several nephews and nieces by other brothers. It was determined, first, that no relations but such as would be entitled under the statute of distributions could take under the devise: and secondly, that on account of the words "equally to be divided between them," they should take *per capita*. I am unable to see any bearing that this case can have upon the one before the Court. The word "relations" is so general in its meaning, that nothing certain respecting the testator's intention as to what relations should take, could be inferred merely from the words of the will. In such cases, the statute of distributions is the best guide, and the Court adopted it to ascertain who should take under the word "*relations*" It having been ascertained who were such relations as were entitled to take under the devise, the word "equally," governed the Court in decreeing that they should take *per capita*. In making such decision, the Court arrived at the most probable intention of the testator, he having used an expression which proved that each relation of Elizabeth Hole answering the legal description contained in the devise, was equally an object of his bounty. All the persons whom the testator intended to take under this devise, were described or designated by the word "relations;" the distribution was to be "equal:" as soon, therefore, as the devisees were ascertained, by the rule adopted by the Court, the mode of distribution was certain and imperious.

The words "heirs of Elizabeth Whitehurst," are here used as "*descriptio personæ*," and who the testator most evidently meant should take collectively; and the devise ought to take effect in that sense. There are no words in the will informing us that the word "heirs" is used in any other than a descriptive and collective sense, and in that sense it must be taken.

The whole of the heirs of Elizabeth Whitehurst,
(389) agreeably to any fair grammatical construction of the words, constitute but one devisee in relation to the words, "equally divided," and as such are entitled to take one-fifth part of the residue devised, and no more. I am therefore of opinion, that the judgment of the County Court was correct, and ought to be affirmed.

FREDERICK FONVILLE *v.* SOLOMON CASEY.

From Craven.

"An agreement made for a valuable consideration, to deliver to the Plaintiff the first female colt, which a certain mare owned by the Defendant might produce, vests a property in the colt when produced, and the Plaintiff may maintain trover for the colt."

This was an action of trover, and the case was sent to this Court upon the question, Whether an agreement made for a valuable consideration, to deliver to the Plaintiff, the first female colt which a certain mare owned by the Defendant should have, did, upon the foaling of such colt, vest in the Plaintiff a property to maintain this action?

TAYLOR, Judge, delivered the opinion of the Court:

There are two questions to be decided in this case: first, Whether chattels can be sold so as to vest in the buyer, without delivery? And secondly, Whether a sale is good of a thing not *in esse* at the time when the contract is entered into?

The right of a thing may be completely transferred by the agreement of the owner made upon a proper consideration, as is manifest from various cases stated in the Books. From the time the sale is completed, the seller is indebted to the buyer for a thing in kind, and is bound to deliver the specific thing sold: but delivery, though necessary (390) to the enjoyment, is not essential to the completion of the right. If a horse be sold and die in the stable of the vendor between the sale and the delivery, the vendor may have an action for the price, the horse being the property of the buyer from the time of the sale. So, if the horse live, and the seller refuse to deliver him, the buyer tendering the price, may take the horse or bring an action for him. Noy's Maxims, Ch. 42. In 1 *Strange*, 167, it is stated, "that property may by our Law be changed without delivery, as a horse sold in a stable; though it is otherwise in the Civil Law."

The learning relative to the second question is briefly noticed by *Reeves* in his History of the English Law, 3 Reeves' His. English Law, 372. According to that writer, the law allowed, in the time of Edward 4th, contracts to include things not *in esse;* and he cites from the Year Book a case, where a man was permitted to make a contract for the sale of all profits or tithes to come off his land the next three or four

years. In the further progress of the principle, a distinction was established between contracts executed and executory; and it was laid down as clear law, that a man could not, by an executed contract, grant any thing of which he was not at the time of the contract, actual or potential owner; and every such contract, without such an interest, was held absolutely void. Plow. 432. Thus, if a man should grant all the wood that he should buy thereafter, the grant was void, because he could not make another possessor of a thing, of which he was not himself proprietor, either actually or potentially. Hob. 132. For the same reason, it is a good plea for a lessee, "that the lessor had nothing in the lands at the time of the lease." Co. Litt. 41, b. Many other cases are brought together to illustrate the distinction, by *Powell* in his *Treatise on Contracts*, who (after stating the case of a writ of annuity granted by a prebend after collation, admission and institution, but before induction, which grant is held to be void, though confirmed by the ordinary,) proceeds thus in summing up the doctrine: "but we must distin-
(391) guish the last mentioned case from those cases in which, although it be uncertain whether the thing granted will ever exist, and it consequently cannot be *actually* in the grantor or certain, yet it is in him *potentially*, as being a thing accessory to something which he *actually* has in him; for such potential property may be the subject of a contract executed, as a grant, or the like. Thus a person may grant all the tythes that he shall have in such a year, yet perhaps he shall have none; for the right to the advowson is in him, and out of that advowson they arise. So a tenant for life may sell the profits of his lands for three or four years to come, and yet the profits are not then *in esse*. Upon the same principle, the lord of a manor may part with the profits of his Court for a time to come." It is also laid down in *Hobart*, 132, that the grant of all the tithe wool of such a year, is good in its creation, though it may happen that there be no tithe wool in that year. But the grant of the wool which shall grow upon such sheep as the grantor shall afterwards purchase, is void.

The principles here laid down, and the cases cited in support of them, appear fully to warrant the judgment of the Court in favor of the Plaintiff; who owning the mare at the time of the contract, had a potential interest in the colts which

she might afterwards produce, and might therefore sell them by an executed contract.

LOWRIE, *Judge, contra.*

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(392)

The Executors of ROBERT ADAM *v.* THOMAS J. ROBESON.

From Duplin.

"In an inquisition of forcible detainer, the proceeding being of a civil nature, the Court will grant a new trial if the Jury find contrary to evidence."

This cause was brought up to the Superior Court of Law for Cumberland County, by a writ of *recordari*, directed to two of the justices of said county, commanding them to certify the proceedings had before them relative to an inquisition of forcible detainer. The cause was removed for trial to the county of Duplin, and at September term, 1807, a trial was had upon the testimony produced by the parties, when the Jury found that the Defendant was not guilty of the forcible detainer complained of by the Plaintiffs. A rule for a new trial was obtained by the Plaintiffs upon the ground that the verdict was contrary to evidence. It was insisted, for the Defendant, that the rule ought not to be made absolute, although the verdict might be contrary to evidence; because the proceedings in this case were in the nature of criminal proceedings, and the law did not allow the granting of a new trial. The case was sent to this Court upon the rule for a new trial, and all the evidence offered upon the trial in the Court below, was certified to this Court. The case was argued by *Gaston*, for the Plaintiffs, and by *Williams*, of Chatham, for the Defendant.

HALL, *Judge*, delivered the opinion of the Court:

After an attentive examination of the evidence offered upon the trial in this case, we are of opinion, that the verdict was not contrary to evidence; and therefore, that the rule for a new trial ought to be discharged. This opinion, would render it unnecessary to say anything upon the second point submitted in this case, were there any doubt in the mind of

the Court. But as the point has come up, we are
(393) willing to express our opinion, that we do not feel bound by any rule of law, to forbid a new trial in a case like the present, did those circumstances exist, for which new trials are commonly granted. It is not so much the form of the proceeding, as the real subject matter of it, which should be attended to. In Norris *v.* Tyler, Cow., 37, which was an action for a malicious prosecution, and in which there was a verdict for the Defendant, the Court, on a motion for a new trial, said, "the Defendant had been sufficiently tried once, where the suit was of a criminal nature," and rejected the motion.

It has been decided, that new trials ought not to be granted in penal actions. 1 Wills., 17; 3 *Id.*, 59. Since that time, however, they have been granted in such actions, for particular reasons; as on account of a mistake or misdirection of the Judge. 4 Term, 753; 5 *Id.*, 19. In the case of King *v.* Frances, 2 Term, 484, which was a *quo warranto* information, the Court granted a new trial, saying, "that *that* of late years had been considered in the nature of a civil proceeding." Yet *Blackstone* in his *Commentaries*, 4 Bl. Com., 312, tells us "that it is properly a criminal prosecution, in order to fine the Defendant for his usurpation, as well as to oust him of his office:" but adds, that "it is considered at present as merely a civil proceeding." The proceeding in the principal case for a forcible detainer, had for its object a restoration of the party to the possession of the premises, in case of *force* found: or in case of force not found, to leave the possession where it was. *Blackstone*, 3 Bl. Com., 179, says, "a forcible entry and detainer is an injury of both a civil and criminal nature." The case before us is of the first kind. The Defendant, if guilty, may be indicted and fined, in which the offence would be considered a criminal one, and a new trial refused. If the finding
(394) of force, by the jury of view before the magistrates, was to be followed not only by a restitution of the possession, but also by fine and imprisonment, a new trial ought not to be granted: but as that finding is only to affect the civil rights of the parties, no good reason seems to exist to forbid the Court to grant a new trial.

JAMES MILLER *v.* LEWIS HUNTER *et al.*

From Lincoln.

Previous to the act of 1809, ch. 8, a debtor imprisoned for debt, was entitled to the benefit of the act for the relief of insolvent debtors, by remaining within the prison bounds (bond having been given for the keeping thereof) for the space of twenty days.

This was a motion for judgment upon a penal bond given by the defendants, conditioned to be void if a debtor who had been arrested upon a *capias ad satisfaciendum*, should keep within the prison bounds The debtor, after giving due notice to the creditor at whose instance he had been arrested, took the oath of insolvency, and went at large; and this having occurred previous to the passage of the act of 1809, ch. 8, * it was submitted to this Court, Whether the debtor was entitled to the benefit of the act for the relief of insolvent debtors, by remaining for the space of twenty days within the prison bounds?

TAYLOR, Judge, delivered the opinion of the Court.

The act of 1773, ch. 4, declares, that "if any person or persons now are, or hereafter shall be taken or charged on mesne process or execution for any debt, and shall have remained in *close* prison by the space of twenty days, (395) it shall and may be lawful for two justices of the Peace," &c, upon the debtor's complying with the several requisites of the act, to discharge him. The act of 1741, ch. 2, declares, "that for the preservation of the health of all such persons as shall at any time thereafter be committed to the county prisons, the Court shall have power to mark out such a parcel of land as they shall think fit, not exceeding six acres, adjoining to the prison, &c., and every prisoner not committed for treason or felony, giving good security to the Sheriff of the county, to keep within the said rules, shall have liberty to walk therein, out of the prison, for the preservation of his or their health. And every prisoner giving such security as aforesaid, and keeping continually within the said rules, shall be and is hereby adjudged and declared to be in law a true prisoner." In a subsequent clause, the same act points out the mode of recovery against

* This act declares, that any person who thereafter should be imprisoned for debt, should not be permitted to take the oath of insolvent debtors, unless he should continue within the walls of the prison for the space of twenty days.

the securities, if the principal should escape, or violate the rules. As the act of 1741, extends the benefits of the bounds to all prisoners, (except those confined for treason and felony,) upon their giving security, and declares that all those who continually keep within the bounds shall be adjudged to be true prisoners, a majority of the Court are of opinion, that the words "a true prisoner," are synonymous with the words "a close prisoner," and that therefore a debtor, having given security as the act directs, and remaining for the space of twenty days within the bounds, is entitled to the benefit of the insolvent debtor's act.

LOCKE, Judge, e contra.—Having given to the acts of 1741, ch. 8, and 1773, ch. 4, an attentive consideration, I am compelled to give them a construction different from that which a majority of the Court thinks to be correct. The act of 1741 must be supposed to have been well understood by the Legislature, which passed the act of 1773; and if the Legislature intended the benefit of the act of 1773, to per-
(396) sons remaining in the prison bounds for twenty days, they would have used some words to explain that meaning more clearly; as, that a person remaining in the prison bounds for the space of twenty days, should have the benefit of the act; or, that a person being a *true* prisoner for twenty days should be entitled to its benefit. But to me it appears, that the Legislature never intended the benefit of the act of 1773 to be extended to any debtor, unless he remained within the walls of the prison for twenty days; and this opinion is confirmed, not only by the expressions used in the two acts aforesaid, but by a consideration of the objects which the Legislature had in view in passing them. In the year 1741, no provision was made for releasing a debtor from prison, until he paid the debt for which he was confined. It was therefore to be presumed, that such prisoners would be numerous, and the period of their confinement long; and that, too, in jails which were small and filthy. In such a situation, the health of prisoners was likely to be impaired, from want of exercise and wholesome air. From a spirit of humanity, therefore, the Legislature granted to such prisoners, the liberty of the bounds, upon their giving security, in order that if they should abuse this privilege, the creditors might have their debts secured; but if they used this privilege in the way directed by the Legislature,

for the preservation of their health, and by keeping continually within the bounds, they should be considered *true prisoners;* that is, the creditors should not have an action against the Sheriff for an escape, they being in contemplation of Law, prisoners, and having broken none of the covenants of the bond given for keeping within the bounds. The act seems to intend nothing more upon this point, than to protect the Sheriff from an action for an escape, to which he would have been exposed, but for the provisions of the act.

What, then, was the object of the Legislature in (397) passing the act of 1773? To adopt some mode by which an honest but an unfortunate debtor should be discharged from prison, although he might be unable to pay his debt; and that was, by imposing on him not only an oath that he was unable to pay, but also an imprisonment for twenty days, in order that this punishment might induce him to make a fair disclosure of his circumstances, and compel him to pay as far as his property might extend, and to release him from further punishment thereafter. The Legislature, well knowing that a debtor having the benefit of the bounds, was in law a *true prisoner*, carefully omitted, in the act of 1773, this expression, and adopted the expression, "*close prison*," in contradistinction to the words, "*a true prisoner;*" a term so clearly indicating the intention of the Legislature as to remove all doubt from my mind. I am therefore of opinion, that judgment should be entered for the Plaintiff.

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(398) JAMES CHILD, Assignee, &c. *v.* JOHN DEVEREUX.

From Orange.

A debtor who is ready to pay his debt when it becomes due, is excused from paying interest thereon, if the creditor conceals his place of residence and the debtor knows not where to apply to make payment.

A. gave his note to B. who, before it became due, was arrested and confined in jail; immediately after his confinement in Hillsborough jail, he published a notice to his debtors, "that their notes were negotiated to persons living out of the State; but if any wished to make payment, by writing to him at Hillsborough, he would cause their notes to be placed in the hands of a person in Newbern, at a certain time: but if payment were not then made, the notes would be returned." The note of A. was not due at the time appointed for B's debtors to

make payment in Newbern; and before it became due, B. was discharged from jail, and left the State secretly. His place of residence was unknown, and in writing to his friends, he would often not date his letters from any particular place. A. made enquiry for him, alleging that B. held his note, which he wished to discharge: he had funds ready to pay the note, but could not ascertain where it was. Several years after the note became due, B. assigned it to C, who gave notice of the assignment to A. A. tendered to C. the principal debt. C. refused to accept it, unless he would also pay the interest. C. sued A. who pleaded a "tender and refusal," and the Court were of opinion that the tender was good, and that A. was not bound to pay interest upon his note.

This was an action on the case, brought on three several promissory notes made payable to Wilson Blount, and signed by the Defendant, as security for John Haslin. Each note was for the sum of two thousand dollars, and was dated the 25th February, 1799. The first was made payable on the 25th February, 1803: the second on the 25th February, 1804; and the third on the 25th February, 1805. The Defendant pleaded a tender and refusal, and the only question in the case was, Whether the Plaintiff was entitled to recover interest upon the money? It appeared in evidence, that in the month of December, 1801, Wilson Blount, the payee of the notes, was arrested upon a *capias ad satisfaciendum*,
(399) and confined in prison at Hillsborough, in Orange county, and that he remained there, either in close jail or within the prison bounds, until the 29th December, 1803, when he left Hillsborough, and expressed a wish to a friend to travel into Virginia by the most secret routes, of which he got directions. His imprisonment was a matter of great notoriety, but during the continuance of it, he was seen by few persons. On the 16th January, 1802, he published in "The Newbern Gazette," a notice dated at Hillsborough on the 21st December, 1801, to the following effect, "That the notes of all persons who stood indebted to him, were negotiated to persons living out of the State; but to accommodate those who wished to make payment of their debts, he informed them, that if they would write to him at Hillsborough to that effect, he would cause their notes to be presented for payment at Newbern, in the month of April then next ensuing; but after that time their notes would be returned." The notes on which this suit was brought, were not assigned at the date of this advertisement, nor for some time after they became due. On the 8th day of June, 1805, John C. Vandenhewel, of New York, received two sets of bills of

exchange, drawn by Catharine H. Haslin, the executrix of the last will of John Haslin, (who had died some time before,) in favor of himself, on merchants in London, for four hundred and fifty pounds sterling each, payable sixty days after sight; which bills were duly accepted and paid. These bills were drawn for the express purpose of paying two of the notes in question, and Mr. Vandenhewel retained the money for this purpose until the 23d February, 1808, when it was drawn out of his hands by the Defendant. In October, 1805, and at other times afterwards, the Defendant expressed to Mr. Vandenhewel great anxiety to learn where the notes were, that he might pay them: and in the years 1804 and 1805, the same anxiety was expressed to Mr. Vandenhewel by Catharine H. Haslin, the executrix. In
(400) the year 1804, the Defendant enquired of Frederick Blount, a relative of Willson Blount, if he knew where Willson Blount was? and was told that he did not know with certainty, but he had understood that he was in Virginia: Defendant told him that Willson Blount had his notes, which he wished to discharge, and that the money was lodged in New York for that purpose. On the 18th December, 1807, a tender of the principal of said notes was made in Newbern to Mr. Durkin, the then assignee, when the Defendant told Mr. Durkin he would not pay the interest, as the money had been ready ever since the notes became due, but he could not ascertain in whose possession they were, Willson Blount being absent, and keeping his place of residence concealed. It also appeared in evidence, that after Willson Blount went to Virginia, he wrote letters to Mr. Hogg, of this State, one of which letters was dated at Suffolk, and others at no particular place, he appearing desirous of concealing his place of residence: and before he left Hillsborough, he told Mr. Hogg, there was a large debt for which a writ had been sued out against him, but he had eluded the vigilance of the officer until the writ became returnable; and before an alias writ could be sued out, he would be out of the State. It was also proved, that the Defendant had always been able to meet his engagements, and was noted for his punctuality in discharging them.

The Jury having found the whole interest against the Defendant, a rule for a new trial was obtained, and the case was sent to this Court for the opinion of the Judges upon the

question, Whether the Defendant ought to pay interest; and if so, to what amount?

BY THE COURT—We are of opinion, that the Defendant ought not to be compelled to pay interest on his bonds, and that the rule for a new trial should be made absolute.

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(401)

Den on Demise of JAMES TYRRELL *v.* PETER MOONEY.

From Rutherford.

Evidence to prove that the person under whom the Defendant claimed, was entry-taker at the time he made his entry, and that he did not make his entry in the manner directed by the act of 1777, ch. 1, (which declares the entry void unless made as the act directs) is inadmissible upon the trial of an action of ejectment.

Although if the case were "*res integra*," the Court might give a different opinion, the construction which was early given to the act of 1777, ch. 1, not to vacate grants by parol evidence in actions of ejectment, ought not now to be departed from.

In many cases, although a statute declares an act *void*, the Courts will construe it to mean that the act is only voidable.

It is of more consequence, that the rules of property should be fixed and notorious, than that they should conform to the principles of justice.

Upon the trial of this ejectment, evidence was offered on behalf of the lessor of the Plaintiff, to prove that the person under whom the Defendant claimed, was entry-taker of the county of Rutherford, at the time the entry was made upon which the grant issued, under which the Defendant claimed title to the lands in question; and that in making his entry, he did not comply with the provisions of the act of 1777, ch. 1, which act in the 9th section declares, "That if any entry-taker shall be desirous to make any entry of lands in his own name, such entry shall be made in its proper place before a justice of the peace of the county, not being a surveyor or assistant; which entry the justices shall return to the County Court at their next sitting, and the County Court shall insert such entry: and every entry made by or for such entry-taker, in any other manner than is therein directed, shall be illegal and void, and any other person may enter, survey, and obtain a grant for the same lands." This evidence was rejected by the Court, and a verdict was rendered for the Plaintiff.

A rule for a new trial was obtained, and the case was sent to this Court upon the question, "Whether, upon the
(402) trial of an ejectment, the evidence offered should be received?"

LOCKE, *Judge*, delivered the opinion of the Court:

The many cases occurring in our Courts under the act of 1777, ch. 1, compelled the Judges at an early period to adopt a construction which excludes the evidence offered in this case. In the case of Reynolds *v.* Flinn, 1 *Haywood's Rep.* 106, the Court said, "Here the Plaintiff has a State grant, and it would be of the most dangerous consequence to avoid it by parol testimony. It is true, that the act of 1777, ch. 1, sec. 9, declares, 'that every right, title, claim, &c. obtained in fraud, elusion, or evasion of the directions of that act, shall be deemed void;' but the meaning is, that it shall be void as to the State, who may proceed to avoid it by *scire facias;* not that it shall be avoided upon evidence in ejectment by an individual citizen." In the case of Wright *v.* Bogan, it was insisted for the Defendant, that he was entitled to the land, because he made the first entry; but the Court said the rule was, that the first grant gave the best title, not the first entry. 1 *Hay.* 177. The same doctrine was held by the Court in the case of Andrews *v.* Mulford, *Id.* 318. Many other cases might be adduced, to shew that the construction of this act of Assembly has uniformly excluded evidence of this kind in an action of ejectment, and compelled persons who have been injured by fraudulent grants to resort to a Court of Equity for relief. Many cases might also be adduced, to shew that where a statute declares an act void, the construction has been, that it is only voidable: as the case of Smith *v.* Warren, Roll. Rep. 159, where the Court held, that although the statute of additions directs, that if any person be outlawed without addition, the outlawry shall be void and of none effect, yet it shall not be void without writ of error. The construction of the act of 1777, has been so long fixed, that the Court cannot think at this day of altering it; although if
(403) this case was entirely new, and brought before the Court now for the first time for a decision, a different construction might possibly be given to the act. Rules of property which have become known and fixed, and which have been long acted under, should never be broken in upon, but for reasons of the most urgent necessity, and then

only by the Legislature. In many instances, it is of much more consequence that the rule should be certain and notorious, than that it should be conformable to strict notions of justice: especially in a case like the present; for the observance of this rule does not deprive the Plaintiff of all remedy; it only compels him to seek it in a Court of Equity, or institute proceedings under the act of 1798, ch. 7, to vacate the grant, which has been obtained in fraud, elusion, or evasion of the act of 1777. The practice of the Courts in refusing evidence in an action of ejectment to vacate a grant, was well known to the Legislature of 1798; and the passing of the act of 1798, ch. 7, and therein giving a remedy at Common Law, must be considered as a Legislative sanction of this practice. This act, instead of directing grants improperly obtained to be vacated by parol evidence in an action of ejectment, has pointed out a much more safe and effectual method of vacating grants, by declaring, that "when any person or persons, claiming title to lands in any of the counties of this State, under a grant or patent from the King of Great Britain, any of the Lords Proprietors of North Carolina, or from the State of North Carolina, shall consider himself or themselves aggrieved by any grant or patent issued or made since the fourth day of July, 1776, to any other person against law, or obtained by false suggestions, surprise or fraud, such person so aggrieved may file his petition in the Superior Court of Law for the district in which such land may lie, together with an authenticated copy of said grant or patent; which petition shall briefly state the grounds whereon such patent should be repealed and vacated; and thereupon a writ of *scire facias* shall issue to the grantee, patentee or person claiming under (404) such grant or patent, requiring him to shew cause why such grant or patent should not be repealed and vacated." And the act authorises the Court to give judgment that such grant or patent be repealed, vacated and made void.

It has been contended, that there has been a departure from the rule early established, in the cases of the Trustees of the University *v.* Sawyer, Taylor's Rep. 115, and Strother *v.* Cathey, decided in this Court. There is certainly a wide difference between those cases and that now under consideration. In the first, the grant was declared void, not upon the ground that the entry was irregular, and that some of

the requisitions of the act of 1777, had been omitted; but because that act only authorised the entry-taker to receive entries for *vacant* and unappropriated land: that the Secretary and Governor had only power to issue grants for land of that description, and as the land for which the Defendant had obtained a grant, had been entered and granted before the entry of the Defendant Sawyer was made, his grant was deemed to be *ipso facto* void. So in the case of Strother *v.* Cathey, at the time the land claimed by the Defendant was entered, the State had no title to it: it had been previously granted to the Cherokee Indians, and was the property of that tribe solely and exclusively; and every entry-taker was forbidden to receive entries for it. The grant to the Defendant was therefore declared void: the State had no title or interest in the land. But the present case is quite different: the land was the property of the State; it was vacant and unappropriated; the officers of State were clothed with power to issue the grant to the Defendant, and the only defect complained of, is the mode of obtaining the grant. This defect must be remedied, and the injury thereby produced redressed by an application to a Court of Equity, or by a petition filed in a Court (405) of Law, under the act of 1798. The evidence was properly rejected, and the rule for a new trial must be discharged.*

*The principle settled in the case of the Trustees of the University *v.* Sawyer, was this, that grants of escheated or confiscated lands by officers appointed to convey *vacant* lands, are void. This case was decided in Edenton Superior Court, at April Term, 1799. The land had been originally granted to a person who left the State before the year 1771, since which time he had not been heard of. In the year 1780, part of the same tract of land was granted to another person, whose title had come to the Defendant, and in the year 1788, another part of the same tract was granted to another person, whose title had likewise come to the Defendant. It was argued for the Defendant, that the State, at the time of these respective grants, was entitled to the lands, either by escheat or confiscation; and having granted them to persons under whom the Defendant claims, could not afterwards make a valid grant of the same lands to the Trustees of the University. But supposing the grants under which the Defendant claimed to be voidable, as having issued by a mistake occasioned by the misrepresentation of the grantees, yet they could not be avoided on a trial in ejectment. BY THE COURT.—The officers authorized by the government to sell and convey *vacant* lands, which had never been appropriated by any grant, have sold and conveyed lands, which have been thus appropriated: to this, their power did not extend, and consequently all such sales and grants are void. The Court will not, on the trial of an ejectment, declare that grants thus

(406)

JOHN LEAREY'S EXECUTORS *v.* LITTLEJOHN & BOND.

From Chowan.

In assumpsit for goods sold and delivered by Plaintiff's testator, a specific legatee, not entitled to any share of the residuum, is a competent witness to prove the delivery of the goods, unless there be a *reasonable* probability that his specific legacy must be resorted to for the payment of debts; for without this reasonable probability, his interest is too remote to go to his competency.

Assumpsit for goods sold and delivered to Defendants by Plaintiff's testator. Plea—the general issue. The Plaintiff offered as a witness to prove the delivery of the articles, one Charles Learey, the son of the Plaintiff's testator, and a specific legatee under the will of his father, but not entitled to any share of the residuum of the estate. This witness was objected to by the defendants' counsel as incompetent on the ground of interest. The Court held the objection to go only to the credit of the witness, and admitted him. The Jury found for the Plaintiff, on the testimony of the witness; and a rule for a new trial being obtained, on the ground that improper testimony had been received, the same was sent to this Court. The Judges here were divided in their opinion: TAYLOR, LOCKE, LOWRIE and WRIGHT, being of opinion that the specific legatee was properly admitted as a witness; HALL and HENDERSON, contra.

BY THE COURT—It is true, the debts of the testator (unless otherwise ordered by the will) are to be charged, in the first place, upon the residuum of the estate, and that must be exhausted before the legacies can be taken to pay debts. It is also true, that the recovery in this case will go to increase the residuum, and *pro tanto* diminish the risk of the specific legatees. But the case does not set forth that it is even probable that the residuum without this recovery, would be insufficient to pay the debts. A remote interest goes
(407) to the credit, and not to the competency of the witness, and under the circumstances as stated in this case, the interest of the witness must be considered as very remote if barely possible. It may be difficult, perhaps impossible, to fix the precise degree of risk which shall exclude

circumstanced shall be recalled and canceled; but they are bound, by the positive terms of the act of 1777, ch. 1, s. 9, to declare that they transfer no title.

a specific legatee having no interest in the residuum, nor pecuniary legacies, nor is it necessary to attempt it in this case. It is sufficient here to say, no such interest appears in the witness offered as ought exclude him.

The following rules are laid down on this subject, and generally acquiesced in. The application of them to particular cases, is sometimes attended with difficulty. The interest which disqualifies a witness is, when there is a certain benefit or disadvantage to him attending the decision of the suit one way. Gilb. 225. Where a question arises on which a doubt may be raised, it ought to be restrained to the credit rather than to the competency of the witness. Hard. 360. The possibility that a witness may be liable to an action in a certain event, does not destroy his competency. 11 Rep. 163. The interest which excludes, must be certain, not contingent. Salk. 283. In a recent case (2 East. 559) it was decided that an occupier, whose name was purposely omitted in the rate, was a competent witness, although it was contended that he was actually interested, for that he might be put on the next rate, while the same burthen subsisted. The Court said, it was perfectly contingent whether the witness would be interested or not; he might die or part with his property before the making of the next rate, and he could not be rejected on the mere ground of an expectant interest. So in the principal case, there may be ample funds, without the aid of this recovery, to discharge all the debts; in which event, the witness does not testify to advance his own interest, but that of the residuary legatee. He is also liable to the common risk of a specific legatee, arising from the destruction of the property. Without presuming that (408) the estate is solvent or otherwise, as interest is set up against the competency of the witness, that interest ought to be made out, and the condition of the fund ought so to be exhibited to the Court, that it may be perceived that a verdict for the Plaintiff would produce a positive benefit to the witness. His interest can only arise upon some future event, which may or may not happen, and cannot therefore destroy his competency. Rule discharged.

WILLIAM M'GIMPSE *v.* ABNER NASH VAIL.

From Chowan.

A. sued B. in the County Court, and recovered a judgment, from which B. appealed to the Superior Court, and gave bond, with C. and D. his securities, for the appeal. In the Superior Court A. was nonsuited, and at the same term, the nonsuit was set aside by consent of B, who at the next term confessed judgment; and at the same term, judgment was entered up against the securities for the appeal. Execution issued, and the securities moved to set aside the execution as to them, because B. had set aside the nonsuit without their consent. Motion disallowed; for

The securities have no control over the proceedings between the Plaintiff and Defendant, and are bound by all the rightful acts of the Defendant in the course of those proceedings.

This was a motion to set aside an execution. The Plaintiff brought an action of debt against the Defendant in Chowan County Court, and obtained judgment, from which the Defendant appealed to the Superior Court, and entered into bond with two securities for prosecuting his appeal and performing the judgment of the Superior Court. At March term, 1808, of the Superior Court, the plaintiff was nonsuited. The plaintiff's counsel being about to move to have the nonsuit set aside and a new trial granted, on affidavits which were shewn to the Defendant, the Defendant proposed to set the nonsuit aside, on condition that each party should pay his
(409) own costs up to that term. This was assented to by the Plaintiff's counsel, and the nonsuit was set aside. At the succeeding term, judgment was confessed by the Defendant, and on motion, judgment was entered up against the securities for the appeal. On this judgment, execution issued, and at the next term, the securities moved to have the execution set aside as to them; contending that they were discharged by the nonsuit, and that it was not competent for the Defendant to set aside the nonsuit without their consent, so as to bind them *de novo*.

TAYLOR, *Judge*, delivered the opinion of the Court:

It would be a manifest violation of the acts relative to appeals, if securities were discharged by a nonsuit, which was not the ultimate judgment of the Court, or which the parties in a spirit of accommodation, or from a sense of justice, mutually agreed to set aside.

The nature of the engagement entered into by the securities to an appeal bond is, to perform the judgment of the Superior Court: the meaning of which is, its final determina-

tion or sentence upon the suit. Until that is rendered, the Court maintains jurisdiction over the cause, and may make such orders as justice requires, and the legal course of judicial proceedings sanctions. With equal force it might be contended, that a verdict in favour of the Defendant operated a discharge to the securities, although a new trial should be granted, as that a nonsuit erroneously awarded by the Court should produce the same effect, although it were afterwards set aside on a more attentive consideration of the subject. Let the motion be disallowed.

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(410)

GEORGE HAUSER AND ANDREW BOWMAN *v.* JOEL MANN AND JOHN BLACK.

From Stokes.

IN EQUITY.

A. and B., citizens of Virginia, sold a stud-horse to C. and D., citizens of this State, and made a false and fraudulent representation of his pedigree. C. and D. being sued on their bond for the purchase money, and judgment being recovered, filed their bill charging the fraud, and praying for an injunction. The injunction was granted, and A. and B. demurred to the bill, and for cause shewed, that it appeared from Complainants' own shewing, they had relief at law. Demurrer overruled upon two grounds.

1. That A. and B. reside in another State, and that C. and D. ought not to be sent beyond the jurisdiction of our own Courts to seek relief.
2. That it being a case of fraud, a Court of Equity will take cognizance of it, and at once save Complainants from an iniquitous recovery at law.

The bill charged, that in February, 1805, Joel Mann, of the State of Virginia, came into this State, having in his possession a stud-horse, which he said belonged to John Black, of Virginia, and that Black had authorised him to sell the horse. He declared to the Complainants, that this horse was a colt of the imported horse *Shark*, and that his dam was begotten by a noted horse called *Bell-Air*. Under these representations, the Complainants purchased the horse at the price of five hundred and twenty-five dollars, of which they paid down one hundred and twenty-five dollars and gave their bond for the balance, which bond Mann immediately,

and before it became due, assigned to Black without responsibility.

The bill then charged, that after the purchase of the horse, the Complainants discovered that the representations made to them by Mann, of the pedigree of the horse, were false; that he was a horse of ordinary blood, and not worth more than two hundred dollars; that Mann was the son in law of Black, and they had combined together to cheat some (411) innocent purchaser in the sale of the horse; that Black had instituted suit against them on their bond, and recovered a judgment; that he and Mann both resided in another State, and had no property here, to which Complainants could resort for compensation for the fraud practised on them. The bill prayed for an injunction against the judgment, except as to seventy-five dollars, which with the one hundred and seventy-five dollars before paid, Complainants alleged to be the full value of the horse.

An injunction was awarded according to the prayer of the bill, and at the next term of the Court, the Defendants demurred, and for cause shewed, that it appeared by Complainants' own shewing, that they had relief at law. The Complainants having joined in demurrer, the case was sent to this Court.

LOWRIE, Judge, delivered the opinion of the Court:

The demurrer admits the allegations of the bill to be true. If the Defendants have been guilty of the fraud charged in the bill, the Complainants are entitled not only to the relief which they ask, but to have the contract set aside. It is said Complaints have relief at law. It is true they have; but where must they go to seek it? Will this Court refuse them relief, because they may go into another State and recover damages in an action at law? Mann came into this State to commit the fraud; Black was his confederate. Here the fraud was committed, and here it ought to be redressed. This Court is of opinion, that the demurrer ought to be overruled, upon either of two grounds. 1st. That the Defendants reside in another State, and that Complainants ought not to be sent beyond the jurisdiction of our own Courts to seek redress. 2d. That this being a case of fraud, a Court of Equity will take cognizance of it, and at once save the Complainants from an iniquitous recovery at law. Let the demurrer be overruled.

(412) ROBERT TEAR *v.* JOHN D. WHITE'S ADMINISTRATOR.

From Bertie.

Judgment *quando assets acciderint* was rendered against an administrator for £1835 4*s.* 2*d.* to be discharged on the payment of £917 4*s.* 1*d.* Plaintiff sued out a *scire facias* suggesting assets and reciting a judgment for £917 12*s.* 1*d*; but not reciting it as a judgment *quando*. &c. *Nul tiel record* and *no assets* were pleaded to the *sci. fa:* The Court sustained the plea of *nul tiel record*, and gave judgment for the Defendant. Plaintiff moved to set this judgment aside, and for leave to amend his writ of *sci. fa.* The judgment was set aside, and leave given to amend on payment of costs.

This was a *scire facias* suggesting assets. Pleas, *nul tiel record, no assets.* The *scire facias* was returned to Bertie County Court, at November term, 1807, and recited a judgment for "£917 12*s.* 1*d*, with interest thereon from the 20th October, 1805, until paid, for debt." The record offered in evidence, was of a judgment for "£1835 4*s.* 2*d*, to be discharged on payment of £917 4*s.* 1*d*, with interest, &c. *when assets*, &c." The Plaintiff had a verdict upon the plea of "no assets," and judgment was given for him upon the plea of "nul tiel record." The Defendant appealed to the Superior Court, and at October term, 1809, the Jury were charged with the trial of the issue of fact, and by the consent of parties a juror was withdrawn and the case continued. At the next term, the plea of "nul tiel record" being submitted to the Court, the variance between the judgment recited in the *scire facias*, and that set forth in the record offered in evidence, was insisted on: and the Court adjudged that there was no such record as that recited in the *sci. fa.* Because, 1st. The *sci. fa.* recited a judgment for £917 12*s.* 1*d*; the record produced was for a judgment of £1835 4*s* 2*d*. 2d. The *sci. fa.* recited an absolute judgment; the record produced was, of a judgment *when assets.*

(413) The Plaintiff moved for, and obtained a rule upon the Defendant, to shew cause why the judgment upon the plea of "nul tiel record" should not be set aside, and he have leave to amend his writ of *scire facias.* The rule was sent to this Court; and

BY THE COURT—The rule may be made absolute upon payment of costs.

Den on the Demise of EVANS *v.* THOMAS SATTERFIELD.

From Chowan.

A devise is colour of title, and seven years possession under it bars the right of entry.

The question in this case was, Whether a devise be such colour of title, that seven years possession under it bars the right of entry. The facts were, that Thomas Haskins being seised of the lands, in the year 1762, devised them to his wife Mary Haskins for life, remainder to his son William in fee. William died without issue, and the estate in remainder descended to his nephew Thomas Haskins, who also died without issue, and the estate descended to *his* nephew Thomas Haskins, who in 1782, conveyed to John Coffield, jun.; and he, in 1787, conveyed to John Coffield, senior. He devised the land to his son Jeremiah, *then of full age*, who died in 1797, intestate, leaving a son named John, and two daughters, Nancy and Betsey. Nancy died at eleven years of age; Betsey intermarried with Evans, the lessor of the Plaintiff, and was under age when this suit was brought, as was also her brother John.

Mary Haskins, the devisee for life, died in 1792, having devised the lands to her son John Haskins in fee. John Haskins died in 1793, having devised the lands to
(414) his daughter Anne, since intermarried with Thomas Satterfield, the Defendant, who had been in possession of the lands from 1793, to the bringing of this suit in 1808.

BY THE COURT—The Defendant has been in possession, claiming under the devise to his wife, fifteen years before the commencement of this suit. When his possession commenced, Jeremiah Coffield was of full age, and laboured under no disability: so that the only question in the case is, Whether the devise to the Defendant's wife be such colour of title, that seven years possession under it, bars the right of entry. The Court are of opinion, that the devise is good colour of title, and that judgment be given for the Defendant.

Den on Demise of PENELOPE CLINTON *et al. v.* ENOCH HERRING.

From Sampson.

A *constructive* possession of lands under colour of title, for twenty-one years, under known and visible boundaries or lines, will not bar the right of entry under the State.

Nor will the *actual* possession, for twenty-one years, of different parts of the lands covered by the colour of title, by purchasers from him to whom the colour of title was made, avail him as to the parts of the lands not sold and actually possessed. For they are distinct tracts, held by different persons in different rights.

The principal question in this case was, Whether, under the act of 1791, ch. 15, a *constructive* possession of lands for twenty-one years, under known and visible boundaries, bars the right of entry under the State? Upon the trial of the ejectment, the lessors of the Plaintiff gave in evidence a deed bearing date 3d November, 1761, executed by Felix Kennon, Sheriff of Sampson county. This deed recited a judgment recovered by John Sampson against one
(415) Vaughan, and an execution that issued on the judgment, which was levied on the land, and that John Sampson became the purchaser. The record of the judgment and execution was not produced. In 1783, John Sampson devised the lands to Richard Clinton, who died intestate in 1794, leaving Thomas, Richard, Owen and William, his sons and heirs at law. Thomas conveyed to Penelope Clinton his undivided share, and she, with the said Richard, Owen and William, were the lessors of the Plaintiff.

The Defendant claimed title under a grant from the State, which issued in 1800, about two years before the commencement of this suit. The fact that the lands were ascertained and identified under known and visible lines or boundaries, was admitted, for the purpose of getting the opinion of the Court upon the main questions in the case; which were,

1. Whether a *constructive* possession of the lands, for more than twenty-one years, under the Sheriff's deed aforesaid, will, under the act of 1791, ch. 15, bar the entry of any person under the State; it being admitted that as to so much of the lands covered by the said deed, as is claimed in this suit, the lessors of the Plaintiff and those under whom they claim have not had twenty-one years *actual* possession?

2. Whether, if a *constructive* possession be not sufficient to bar the right of entry, the *actual* possession for twenty-one years of divers different parts of the lands covered by the Sheriff's deed, by purchasers from Sampson, shall avail him

and those claiming under him, as to the parts not sold and actually possessed?

Upon the trial of this case in the Superior Court, the Jury found a verdict for the Defendant under the charge of the Court; and a rule for a new trial being obtained, the same was sent to this Court.

HALL, *Judge*, delivered the opinion of the Court:

(416) The act of 1791, ch. 15, declares, "That where any person or persons, or the person or persons under whom he, she or they claim, shall have been, or shall continue to be in possession of any lands, tenements or hereditaments whatsoever, under titles derived from sales made either by creditors, executors or administrators of any person deceased, or by husbands and their wives, or by endorsement of patents, or other colourable title, for the space of twenty-one years, all such possessions of lands, tenements or hereditaments, under such title, shall be, and they are hereby ratified, confirmed and declared to be a legal and good bar, against the entry of any person or persons under the right or claim of the State, to all intents and purposes whatsoever, any former act, law or usage to the contrary in anywise notwithstanding: Provided nevertheless, that the possession so set up shall have been ascertained and identified under known and visible boundaries or lines." Before this act, no possession, however long and however well ascertained and identified under known and visible lines or boundaries, could have ripened into a title against the State. Where the title was out of the State, and in an individual, the act of 1715 had declared that an adverse possession for seven years should bar the right of entry under such title. The obvious policy of the act of 1791, was to favor persons who took *actual* possession of lands under known and visible boundaries, and remained in such possession for twenty-one years. It certainly could not have been the intention of the Legislature, to confirm the titles of those who claimed lands under some one or other of the titles mentioned in the act, and who had been only *constructively*, not *actually* possessed of the lands for twenty-one years.

As to the second question made in this case, it is to be observed, that when Sampson sold a part of the lands covered by the Sheriff's deed to him, and the purchaser took actual

possession of such part, that possession extended to
(417) the limits of the lands so purchased, and no further. The purchaser had no more right to the possession of the residue of the lands, (the title to which still remained in Sampson,) than Sampson had to the possession of the land he had sold. They were two distinct tracts, held by different persons, in different rights. It is not like the case of one person holding possession on behalf of and under the title of another. If the person had not purchased, but taken possession of a part of the tract in the name of the whole, for and on behalf of Sampson, and by his permission, that would have been Sampson's possession. The rule for a new trial must be discharged.

ISAAC WILLIAMS *v.* HENRY BRANSON.

From Moore.

Freighters for hire upon navigable rivers are to be considered as common carriers, and subject to their liabilities.

The words of a bill of lading, "dangers of the river only excepted," signify the natural accidents incident to that navigation; not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment.

This was an action on the case, to recover damages of the Defendant for the loss of a hogshead of sugar. The case was, that the Defendant was the owner of a boat that carried freight on the Cape Fear River, between Fayetteville and Wilmington. His skipper contracted with the Plaintiff's agent at Wilmington, to carry from that place to the town of Fayetteville, certain articles, for which he gave a receipt in the following words, to-wit:

(418)

"Wilmington, 11th Dec., 1806.

"Received of Mr. Henry Williams, in good order and well conditioned, the following articles, viz:

1 Hogshead of Rum,
5 do. of Brown Sugar, &c.

which said articles, I promise to deliver to Messrs. Nesbit and Campbell at Fayetteville, the dangers of the river only excepted, their paying freight for the same.

Signed, "HUGH M'CALL."

One of the hogsheads of sugar mentioned in the receipt being larger than common, could not be stowed away in the hold of the boat, but was placed behind on the hatches, a place where sugar was sometimes, but not usually carried, except large hogsheads. There was at the time a considerable freshet in the river. About ten miles above Wilmington, a large cypress tree stood on the bank, leaning over the water; and at this place there was a bend in the river. In passing this tree, the stream being rapid, the stern of the boat was driven in towards the bank, and passed under the tree, which forced the hogshead overboard, together with the skipper, who was trying to save it.

It appeared in evidence upon the trial of the cause, that the skipper, after having deposited the other articles in his boat did not wish to take on board this hogshead of sugar on account of its size, and he informed the Plaintiff's agent, that if the hogshead were taken, it must be placed on the hatches; and the hogshead was placed there with his knowledge, he saying, if the skipper would not take it, he should take nothing.

It further appeared in evidence, that at the time the hogshead was forced overboard, the boat was in the common way, and that this was the only way along which boats could be got up the river in times of high water. That boats are got up the river by hooking and gigging; and that whilst the hands were engaged in the bow of the boat in hooking to the trees and limbs which stood on the bank or stretched over the water, the rapidity of the current drove the stern of the boat under the tree, which forced the hogshead overboard. The cypress tree was a noted (419) one, and well known to the skipper and crew of the boat; there appeared to be no neglect in the skipper and crew, unless the circumstances as stated, constitute neglect in contemplation of law.

The Jury found a verdict for the Defendant, and a rule for a new trial being obtained upon the ground that the verdict was contrary to evidence, the same was sent to this Court.

TAYLOR, *Judge*, delivered the opinion of the Court:

If the loss of the property were occasioned by such an accident as came fairly within the scope of the exception contained in the bill of lading, or receipt, the Defendant ought

not to be responsible; otherwise, he must be, upon every principle applicable to the duty of common carriers.

The words of that paper are, "dangers of the river only excepted," and signify the natural accidents incident to that navigation; not such as might be avoided by the exercise of that discretion and foresight, which are expected from persons in such employment.

Nor indeed is every loss proceeding from a natural cause, to be considered as happening by a peril of the sea; for if a ship perish in consequence of striking against a rock or shallow, the circumstances under which the event takes place, must be considered, in order to decide whether it happened by a peril of the sea, or by the fault of the master. If the situation of the rock or shallow be generally known, and the ship not forced upon it by adverse winds or tempests, the loss is to be imputed to the fault of the master (Abbot, 169); or if the shallow were occasioned by a sudden and recent collection of sand in a place where ships could before sail in safety, the loss is to be attributed to the act of God or the perils of the sea. Id.

Apply this principle to the case before us, and consider whether the circumstances under which the loss happened do not announce a degree of carelessness or temerity (420) in the skipper, that ought to render the Defendant responsible to the Plaintiff.

The force of the current in the time of a freshet, and the increased danger thence arising from the cypress tree, were well known to the skipper. He should not have adventured to pass the bend at such a time, without employing adequate precautions to obviate the danger, if indeed any precaution could have been sufficient. But in prosecuting that part of the voyage, at such an unseasonable time, he took the risk upon himself. The state of the river, it is true, was equally known to the Plaintiff, but he neither knew the consequent hazard connected with this part of it, nor does it appear that he urged the departure of the skipper in the face of such danger.

Here, then, was no tempest—no irresistible impulse of natural causes, but a fixed and well known danger, which every man, accustomed to the navigation, would calculate upon meeting, if he proceeded on the voyage at such a time, with only the usual number of hands; and even these, it appears, were all employed at the bow of the boat, whilst none were

left in the stern to counteract the tendency of the current to force that part under the tree. Thus, in the case of Amis *v.* Stephens, 1 Stra. 128, where the Plaintiff put goods on board the Defendant's hoy, which sunk in consequence of a sudden gust of wind, as she came through a bridge, the Court held the Defendant not liable, as the accident was occasioned by the act of God; but they said, if the Defendant had ventured to shoot the bridge, at a time when the general bent of the weather was tempestuous, he would have been liable. The rule for a new trial must be made absolute.

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(421)

PATRICK BROWN *v.* EPHRAIM FRAZIER AND BARNETT PULLIAM.

From Hertford.

An action cannot be maintained upon a bond given by a person arrested upon a *capias ad satisfaciendum*, to keep within the limits of the rules of the prison. For

The act of 1759, ch. 14, gives to such bond *the force of a judgment*, and authorises the creditor to have execution thereon, upon motion in Court.

The Plaintiff having recovered a judgment against Frazier, sued out a *capias ad satisfaciendum*, upon which Frazier was arrested, and he entered into bond, with Barnett Pulliam his security, for keeping within the rules of the prison. The bond was taken by the Sheriff, and by him assigned to the plaintiff in the manner prescribed by the act of 1741. ch. 18, and 1759, ch. 14. The Defendant Frazier having gone without the rules of the prison, the Plaintiff brought an action on the bond given by him and Pulliam, for his keeping within the rules: and the question in the case was, Whether the action could be sustained?

BY THE COURT—The act of 1759, ch. 14, declares, "That bonds given in pursuance of the act of 1741, ch. 18, by any person committed on a *capais ad satisfaciendum*, shall, by the Sheriff taking the same, be assigned to the party at whose instance such person was committed to Jail, and shall be returned to the office of the Clerk of the Court from whence such execution issued, there to be safely kept, *and shall have the force of a judgment:* and if any person who shall obtain

the rules of any prison, upon giving bond and security as aforesaid, shall escape out of the same, before he shall have paid the debt, or damages and costs, according to the condition of such bond, it shall be lawful, and full power and authority are hereby given to the Court where such bond is lodged, upon motion of the party for whom such (422) execution issued, *to award execution* against such person and his securities, for the debt, or damages and costs, with interest," &c. This act gives to the bond *the force of a judgment*, and authorises the party to have execution sued out thereon, upon mere motion. Here the plaintiff has brought an action on the bond as a common deed. He cannot elect to treat it as such; he cannot divest it of the attributes given to it by the act. He must consider it as clothed with the force of a judgment, and take the remedy thereon which the act prescribes. Judgment for the Defendants.

JESSE CARTWRIGHT *v.* JESSE GODFREY *et al.*

From Camden.

Upon the trial of issues of fact in a suit in Equity, a motion to read in evidence in his behalf Defendant's answer, which had been replied to, and its allegations disproved by more than one witness, was disallowed.

Complainant filed a bill in Equity, to which Defendant put in his answer, which was replied to, and depositions were taken. The allegations of the answer were contradicted by more than one witness; and upon the trial of the issues of fact in the cause, it was moved on behalf of the Defendant, that his answer be read in evidence in his behalf. The motion was overruled, and the Jury found for the Complainant, upon the issues submitted to them. Defendant obtained a rule for a new trial upon the issues, on the ground that his answer ought to have been admitted as evidence. The rule was sent to this Court; and,

BY THE COURT—The Court below did right in refusing to admit the Defendant's answer to be read in evidence. Let the rule be discharged.

(423)

WILLIAM & P. M. SLOCUM *v.* NEWBY AND PLEAS.

From Perquimons.

It is no objection to the competency of a witness, that he is counsel for the Plaintiff, and intends, if the debt sued for be recovered, to charge a commission for receiving and remitting the money.

This was a question as to the admissibility of a witness. The Plaintiffs claimed a debt in this case, and their counsel offered himself as a witness. He was examined on his *voire dire*, and declared that he was not otherwise interested than as counsel, that there was no special agreement between the Plaintiffs and himself: but if the debt were recovered, he should charge a commission for receiving and remitting the money. He was admitted as a witness, and a verdict being given for the Plaintiffs, a rule for a new trial was obtained by the Defendants, on the ground that improper testimony had been received. The rule was sent to this Court; and

BY THE COURT—The objection to the witness goes to his credibility, and not to his competency. The rule discharged.

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(424) CARLTON *v.* BLOODWORTH.

From Duplin.

In an action of trover for a negro slave, the Plaintiff offered in evidence a certified copy from the registry, of the bill of sale for the slave, he first making an affidavit, that the bill of sale was not in his possession or power; that he had delivered it to the register to be registered, and on application for it afterwards, was told by the register that it was lost. There was a subscribing witness to the bill of sale, who resided in the State, and he was not produced as a witness. Held, that the copy cannot be received in evidence.

1st. On account of the insufficiency of the proof as to the loss of the original;

2d. Because the act of 1792, ch. 6, requires that in all trials where the title of a slave is evidenced by a written transfer, the execution of such writing shall be proved by the subscribing witness, if alive, and within the State; and there cannot be less reason for requiring the subscribing witness, where a copy is offered in evidence, than where the original is offered.

This was an action of trover for a negro slave. The Plaintiff offered in evidence a certified copy from the registry, of a bill of sale for the slave, upon an affidavit by him made,

that the original was not in his possession or power; that he had delivered it to the register to be registered, and had afterwards applied for it, and it could not be found. It appeared from the copy, that there was a subscribing witness to the original, and it was admitted that he resided in the State. The admission of this copy in evidence, was objected to upon two grounds: 1st. The insufficiency of the proof as to the loss of the original; 2d. That the subscribing witness ought to be in Court, to be examined touching the execution of the original. The Court permitted the Plaintiff to proceed, and reserved the points made as to the admissibility of the copy in evidence; which, upon a verdict being found for the Plaintiff, were sent to this Court.

BY THE COURT—Each of the objections made to the admission of the copy in evidence, is good. It appears by the affidavit of the Plaintiff, that the original was (425) lost after he delivered it to the register; and if it be competent for the Plaintiff to prove that he delivered it to the register, it surely is not also competent for him to prove that the register lost it. The fact of loss, according to the Plaintiff's own shewing, could be proved by the register, and that fact must be proved before the copy shall be read.

As to the second objection, it is declared by the act of 1792, ch. 6, "that in all trials at law, where a written transfer or conveyance of a slave or slaves, shall be introduced to support the title of either party, the due and fair execution of such writing shall be proved by a witness subscribing and attesting the execution of such writing: but if such witness shall be dead, or removed out of the State, then the probate and registration of such writing may be given in evidence." There cannot be less reason for requiring the subscribing witness, where a copy is offered in evidence, than where the original is offered. Judgment that the verdict be set aside and a nonsuit entered.

(426) DANIEL SMITH *v.* OBED WILLIAMS.

From Onslow.

A. having sold a slave to B., and given to B. a written instrument, setting forth "that for the consideration of $300, he had sold the slave to B., and that he would warrant and defend the slave against the claims of all persons," but setting forth nothing as to the soundness of the slave; B. shall not be permitted to set up a parol warranty of soundness, and recover on it against A.: for

This would be to add by *parol* to a written contract.

The parties, by making a written memorial of their transaction, implicitly agree, that in the event of any future misunderstanding, that writing shall be referred to as the proof of their act and intention; that such obligations as arise from it by just construction or legal intendment, shall be valid and compulsory on them, but that they do not subject themselves to any stipulation not set forth in the writing. For if they meant to be bound by any such, they might have added them to the writing, and thus have given to them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness.

Where anything forming part of the contract, is left out of the writing by fraud or accident, or anything forming no part of the contract, is inserted by fraud, parol evidence may be received to prove these facts.

But where nothing is omitted or inserted in the writing, through fraud, accident or mistake, parol evidence shall not be received to shew that the agreement of the parties was otherwise than the writing sets forth.

This was an action on the case for a breach of warranty in the sale of a negro. The declaration stated, "that the Defendant warranted the negro to be sound and healthy as far as he knew; that the negro was unsound and unhealthy, being afflicted with a rupture, and that the Defendant well knew he was so afflicted at the time of the warranty and sale." The Jury found a verdict for the Plaintiff, subject to the opinion of the Court on a point of law reserved in the course of the trial, viz: Whether the Plaintiff could be permitted to prove such a warranty, when at the delivery of the negro upon the sale, he received from the Defendant a writ-
(427) ten instrument, but not under seal, in the following words:

"Know all men by these presents, that I, Obed Williams, of the county of Onslow, and State of North Carolina, have bargained and sold unto David Smith, of the aforesaid county and State, one negro fellow, named George, about thirty years of age, for and in consideration of three hundred dollars. I do warrant and defend the said negro against the lawful claim or claims of any person or persons whomsoever, unto him the said Smith, his heirs and assigns forever. Given under my hand this 29th January, 1802.

"OBED WILLIAMS.

"Teste: GEORGE ROAN."

This instrument had been proved in Onslow County Court, and registered. The point reserved was sent to this Court; and

TAYLOR, Judge delivered the opinion of the Court:

The contract between the parties is stated at length in the special case, and appears to be both formally and substantially a bill of sale in all respects, except as to the want of a seal. This omission, however, is so important in the legal estimation of the paper, that it cannot be classed amongst specialties, but must remain a simple contract, on which no additional validity can be conferred by the subsequent registration. For I do not apprehend that any legal effect can be given to a paper by recording it, if that ceremony were not required by law.

It might not however, be an useless enquiry to consider, whether a paper containing nearly all the component parts of a specialty or deed, does not advance some greater claims to be respected in the scale of evidence, than such proofs of a contract as rest upon the memory of witnesses.

The solemnity of sealed instruments has been, from the earliest periods of the Law, highly regarded; because the forms and ceremonies, which accompany them, bespeak deliberation in the parties, and afford a safe ground (428) for Courts and Juries to ascertain and settle contested rights. This deliberation is inferred, not from any one circumstance attending the transaction, but as the general effect of the whole. Thus in *Plowd.*, 308. *B.* "It is said that deeds are received as a *locum finale* to the party making them, although he received no consideration, in respect of the deliberate mode in which they are supposed to be made and executed: for, first, the deed is prepared and drawn; then, the seal is affixed; and lastly, the contracting party delivers it, which is the consummation of his resolution." Hence it appears, that the law gives to deeds a respect and importance which it denies to any other contracts; not an empty and unmeaning respect, but such as properly arises from the existence of all those circumstances which are calculated to fix and make authentic the contracts of men.

A contract cannot be a deed, if either it is not prepared and drawn; if the seal be not affixed, or if it be not delivered; but still if the deliberation is inferred from all these circumstances, it is fair reasoning to presume some degree of

deliberation from any one or two of them, and to give to the paper, when it is introduced as evidence of the parties' transaction, precisely such credence as belongs to it, from its partaking more or less of the nature of a deed.

To give this rule a practical application to the case before us, the conclusion would be, that as the paper is without a seal, it cannot be a deed, and is therefore not decisive evidence as that instrument is; it is not a *final lien;* but as it possesses some of the essentials of a deed, viz, a formal draught and delivery, so far it shall be regarded as evidence of no slight nature of the fact it is introduced to establish.

The writers on the Law of Evidence have accordingly, in arranging the degrees of proof, placed written evidence of every kind higher in the scale of probability than unwritten; and notwithstanding the splendid eloquence of Cicero, to the contrary, in his declamation for the poet (429) Archias, the sages of our Law have said that the fallibility of human memory weakens the effect of that testimony which the most upright mind, awfully impressed with the solemnity of an oath, may be disposed to give. Time wears away the distinct image and clear impression of the fact, and leaves in the mind, uncertain opinions, imperfect notions and vague surmises.

It is, however, contended by the Plaintiffs, that contracts by our law are distinguished by specialty and by parol; that there is no third kind, and that whatever is not a specialty, though it be in writing, is by parol. To establish this position, a case is cited from 7 *Term Rep.* 350, by which it is certainly proved. But the position being established, whether it will authorize the inference that parol evidence is admissible to vary and extend written evidence, will best appear from an examination of the case, and from some attention to the question which called for the solution of the Court.

In the case cited, the declaration states, that the Defendant, being indebted as administratrix, promised to pay when requested, and the judgment is against her generally. From this statement it is manifest, that the promise could not be extended beyond the consideration which was in another right as administratrix, and made to bind the Defendant personally. But in order to avoid this objection, it was contended, that the promise being reduced to writing, the necessity of a consideration was dispensed with; and that the fact of its having been made in writing might well be pre-

sumed after verdict, if necessary to support the verdict, which latter position was conceded by the Court.

It is, then, perfectly evident, that the only question in the case was, whether *nudum pactum* could be alleged against a contract in writing, but without seal? That it could not, had been a notion entertained by several eminent men, and amongst the rest by the learned commentator, who observes, that "every bond, from the solemnity of the instru-
(430) ment, and every note from the subscription of the drawer, carries with it internal evidence of a good consideration." This doctrine, however, is inaccurate as applied to notes, when a suit is brought by the payee, and is only correct as between the indorsee and drawer. To demonstrate the propriety of the objection, it became necessary for the Court, in *Ram* v. *Hughes*, to enter into a definition and classification of contracts, into those by specialty and those by parol; to which latter division every contract belongs that is not sealed, though it may be written. Every written unsealed contract is, therefore, in the strict language of legal precision, a parol contract, and like all others, must be supported by a consideration.

But let it be considered, what the Court would have said, if the case, instead of requiring them to give a precise and comprehensive definition of contracts, had called upon them for a description of the evidence by which contracts may be supported. They would, I apprehend, have said, (because the law says so,) the evidence which may be adduced in proof of a contract is threefold: 1st. Matter of record: 2d Specialty: 3d. Unsealed written evidence, or oral testimony. It is therefore necessary to distinguish between a contract, and the evidence of a contract, for though they may be, and are, in many cases, identified; yet in legal language, a parol contract may be proved by written evidence. This is the case now before us, and this brings me to the question it presents, which I understand to be, Whether oral evidence is proper to extend and enlarge a contract which the parties have committed to writing? The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is, that the parties, by making a written memorial of their transaction, have implicitly agreed, that in the event of any future misunderstanding, that wri-

ting shall be referred to, as the proof of their act and
(431) intention: that such obligations as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract; because, if they meant to be bound by any such, they might have added them to the writing; and thus have given them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness. For this end, the paper is signed, is witnessed, and is mistakenly recorded. But the Plaintiff says, besides the warranty of title contained in the writing, the Defendant made me another warranty as to the quality, which I can prove by a witness present at the time; and though he has complied with the warranty which was committed to writing, yet he has broken the one which was orally made, whence I am injured and seek compensation.

We are then to decide, Whether the law deems such proof admissible?

By the Common Law of England, there were but few contracts necessary to be made in writing. Property lying in grant, as rights and future interests, and that sort of real property, to which the term incorporeal hereditament applies, must have been authenticated by deed. So the law remained until the stat. 32 H. 8, which, permitting a partial disposition of land by will, required the will to be in writing; but estates in land might still be conveyed by a symbolical delivery in presence of the neighbors, without any written instrument; though it was thought prudent to add security to the transaction by the charter of feoffment. The statute of 29 Car. 2, commonly called the statute of frauds, has made writing and signing essential in a great variety of cases wherein they were not so before, and has certainly increased the necessity of caution in the English Courts, with respect to the admission of verbal testimony, to add to or alter written instruments, in cases coming within the provisions of that statute. That law being posterior to the date of the
(432) charter under which this State was settled, has never had operation here; so that the Common Law remained unaltered until the year 1715, when a partial enactment was made of the provisions of the English statute.

The law must therefore be sought for in cases arising before the statute of frauds, and expositions upon that statute

are no otherwise authoritative than as they affirm or recognize the ancient law. But I believe there can be no doubt that the rule is as ancient as any in the law of evidence, and that it existed before the necessity of reducing any act into writing was introduced.

In *Plowden*, 345, Lord Dyer remarks, "men's deeds and wills, by which they settle their estates, are the laws which private men are allowed to make, and they are not to be altered even by the King, in his Courts of Law or conscience."

In Rutland's case, 5 *Coke*, the Court resolved that it was very inconvenient that matters in writing should be controlled by averment of parties, to be proved by uncertain testimony of slippery memory, and should be perilous to purchasers, farmers, &c.

The case of Meres and others *v.* Ansel and others, in 3 *Wilson*, 275, is directly in point upon the general principle, to shew that parol evidence shall not be admitted to contradict, disannul or substantially vary a written agreement.

In 2 *Atkins*, 384, Lord Hardwicke says, "it is not only contrary to the statute but to Common Law, to add anything to a written agreement by parol evidence."

All written contracts, says Justice Ashurst, whether *by deed or not*, are intended to be standing evidence against the parties entering into them. 4 *Term Rep.*, 331.

1st *Ves. jr.*, 241, parol evidence to prove an agreement made upon the purchase of an anuity that it was redeemable, was rejected.

In a very recent case, in 7 *Ves.* 211, we are fur-
(433) nished with the opinion of the present Master of the Rolls, Sir William Grant, than whom no Judge ever ranked higher in the estimation of his contemporaries, for profound and accurate knowledge in legal science, and a proper and discriminating application of well grounded principles to the cases which arise in judgment before him. His observations are, "By the rule of Law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement, would be the same as receiving it for every purpose. It was for the purpose of shutting out that enquiry that the rule was adopted. Though the written instrument does not contain the terms, it must in contemplation of law, be taken to

contain the agreement, as furnishing better evidence than any parol can supply."

To these authorities, I will add a decision of the Circuit Court of Pennsylvania, because it appears to be in principle the very case under consideration.

An action on the case was brought by the assignee of a bond against the assignor, upon a written assignment in general terms. The Plaintiffs offered oral evidence to shew that the Defendant had expressly guaranteed the payment of the bond. "CHASE, Justice—You may explain, but you cannot alter a written contract by parol testimony. A case of explanation implies uncertainty, ambiguity and doubt upon the face of the intrument. But the proposition now is a plain case of alteration: that is, an offer to prove by witnesses, that the assignor promised something beyond the plain words and meaning of his written contract. Such evidence is inadmissible, and has been so adjudged in the Supreme Court, in Clark *v.* Russel, 3 *Dal.* 415. I grant that Chancery will not confine itself to the strict rule, in cases of fraud, and of trust: but we are sitting as Judges at Common Law, and I can perceive no reason to depart from it."

(434) I suppose the above authorities are amply sufficient to establish the proposition for which they are cited, and therefore I forbear to make any other references for that purpose. The exceptions to the general rule may be comprised under the heads of fraud, surprise, mistake, in cases of resulting trust, to rebut an equity, or to explain latent ambiguities; and there may also be some other cases which cannot be properly ranged under the titles specified. But as the case stated is, in my opinion, directly opposed by the general rule, so far as it seeks to establish the proof of warranty as to quality, by parol, and presents no fact to bring it within any of the exceptions, it would be needless to multiply authorities with respect to them.

As to the exception on the ground of fraud, I conceive that only occurs, where something intended to have been inserted in the contract, is omitted through the misrepresentation or unfair practice of one of the parties. In such case, the omission may be supplied by parol evidence. But there is no allegation here that the additional warranty was intended or understood by either party to have been inserted in the agreement.

It is also necessary to attend to the nature of the remedy

adopted by the Plaintiffs in this case, which is founded on the warranty, and is in assumpsit. The questions arising upon the general issue are, whether the warranty was made, and whether it was true at the time of making. For if the warranty were made, and not complied with, it is wholly immaterial whether the defect was known to the seller or not, a principle that seems to extend to every case where the Plaintiff proceeds on the warranty. But in an action of deceit, the *scienter* or fraud is a material part of the declaration, and must be brought home to the Defendant to authorise a recovery against him, and in such case it seems from the authorities, that proofs of the fraudulent conduct of the Defendant may be drawn from sources *dehors* the written contract. It cannot be contended, that inserting the
(435) *scienter* in a declaration on the warranty, will convert it into an action of deceit founded on *tort*. In the latter action, the knowledge of the Defendant, or something equivalent to it by which the fraud is charged, is a substantive allegation, and must be proved: in the former, it is merely surplusage, and may be rejected.

THE STATE *v.* JAMES ENGLISH.

From Burke.

The prosecuting officer for the State has a discretionary power to indorse the Governor as prosecutor on bills of indictment, whenever he may think the public interest may require it.

The question submitted to the Court in this case, was, Whether the prosecuting officer for the State has a discretionary power to indorse the Governor as prosecutor on bills of indictment, whenever he may think the public interest may require it.

TAYLOR, Judge, delivered the opinion of the Court:

It is necessary in many cases, to prevent a failure of justice, that a prosecutor should be indorsed on a bill, where no individual is willing to become one. The Governor represents the supreme executive power of the State, and according to the theory of our Constitution, is bound to attend to the due enforcement and execution of the laws. For this

particular object, he represents the sovereignty of the people in its highest and ultimate capacity; and although he cannot personally direct, may tacitly influence the subordinate officers in their details of duty more immediately within their control. A discretion resides in the prosecuting officer to indorse on a bill as prosecutor whomsoever he may think fit; subject however, to the interference of the Court, in cases where the exercise of such a power may operate injuriously to an individual. The practice of indorsing the
(436) Governor is to be preferred, since it cannot, in any instance, produce inconvenience to an individual, and may tend to the due execution of the laws by the punishment of offenders, where otherwise no individual would step forward to prosecute. The Court, however, go on the presumption, that the discretion will, in every case, be exercised with a view to the public advantage; and thus guarded, it ought to be sanctioned.

HENRY WARREN *v.* ALSEY HIGH.

From Wake.

The probate of a will attested by only *one* witness being caveated in the County Court, an issue of "*devisavit vel non*" was made up under the direction of the Court; and the Jury found, that "the deceased did, in the said will, devise *both real and* personal property." The caveator appealed, and in the Superior Court the Jury found, that "the paper writing offered as the will did devise as to personals, but not as to real estate." The executor offering the will for probate, shall pay the costs; it being his folly to insist in the County Court, that the will, being attested by only *one* witness, could pass the real estate.

A paper writing, purporting to be the last will of William Martin, deceased, was offered for probate in Wake County Court, and a caveat was entered to the probate thereof. An issue of *devisavit vel non* was made up under the direction of the Court. The paper writing was attested by only *one* witness, and the Jury returned for their verdict, "that the deceased did devise both real and personal property, in the paper writing offered in evidence as the last will and testament of the said William Martin." The Defendant, the caveator, appealed to the Superior Court; in which Court,

the issue being submitted to a Jury, they found, "that the paper writing purporting to be the last will and testament of William Martin, deceased, doth devise as to per-
(437) sonals, but not as to real estate." A question was then made who should pay the costs? Which question being sent to this Court,

HALL, *Judge*, delivered the opinion of the Court:

It appears that the only real question here decided, was as to the real property, under the issue of "*devisavit vel non*." In the County Court, a verdict was found for the Plaintiff, although there was only one subscribing witness to the will. The Defendant very properly appealed, and a verdict was found in favor of him in the Superior Court. As our law requires at least two subscribing witnesses to a will of land, and as it was supposed by those who had an agency in deciding this question in the County Court, that that requisite might be dispensed with, the Defendant was necessarily driven to his appeal; and of course, the Plaintiff ought to pay the costs.

HENRY WILLIAMS, Chairman, &c. *v.* JOHN HICKS.

From Warren.

The distributees of an intestate's estate may bring suit for their distributive shares against the securities of an administrator, upon the administration bond, without any previous proceeding against the administrator, although he has made no settlement of his administration with the Court, nor filed an account current.

John Witherston having died intestate, letters of administration were granted to Nancy Witherston, who entered into bond, with John Hicks her security, for her faithful administration of the estate of her intestate. She returned to the County Court an account of sales of the estate, and then removed out of this State to parts unknown, having made no
(438) settlement with the Court, nor returned an account current of her administration. The intestate left two children, Rebeccah and Gabriel; and for the purpose of recovering their distributive shares of his estate, they brought an action of debt against John Hicks for the non-perform-

ance of the conditions contained in the bond given by the administratrix, to which he was security; and upon the trial, gave in evidence the account of sales aforesaid, for the purpose of shewing the amount of the estate. A verdict was given for the Plaintiff, subject to the opinion of the Court, upon the question, Whether this suit could be maintained before some proceedings were had against the administratrix, whereby it could be ascertained what was the surplus remaining in her hands for distribution?

BY THE COURT—We are of opinion the suit can be maintained on the bond against the security, although the administratrix has not settled her accounts, nor any proceedings been had against her to ascertain the surplus in her hands for distribution. Judgment for the Plaintiff.

HENRY VERVELL *v.* JOHN TREXLER.

From Rowan.

The Plaintiff in a writ of certiorari, is entitled to file affidavits, after those of the Defendant have been filed, either to confirm those upon which the writ was obtained, or to disprove those filed by the Defendant; and he is entitled to a continuance of the cause, to procure such affidavits, if he make it appear to the satisfaction of the Court, that he cannot procure them at the term at which the Defendant's affidavits are filed.

Upon the affidavit of Henry Vervell, a writ of certiorari was granted, directed to the Clerk of the Court of Pleas and Quarter Sessions for Rowan County, commanding
(439) him to certify the record of certain proceedings had in a cause depending in the said Court, wherein John Trexler was Plaintiff, and the said Vervell was Defendant. This writ was returnable to April term, 1810, of the Superior Court of Law for Rowan County; at which time, Trexler, the Defendant to the writ, filed his affidavit in opposition to the affidavit of Vervell, and in avoidance thereof. Vervell prayed time of the Court until the next term, to file affidavits in confirmation of the first affidavit by him made to procure the writ of certiorari, and to disprove certain facts set forth in Trexler's affidavit; and for this purpose, he moved for a continuance of the cause upon affidavit. A question

was made, Whether the Plaintiff in certiorari, after the Defendant has filed his affidavits, is entitled to take and file other affidavits, either in confirmation of that upon which the writ was granted, or in opposition to those filed by the Defendant; and also entitled to a continuance of the cause, for the purpose of procuring such affidavits, where it appears to the Court upon affidavit, that he had not the opportunity of taking them at the term at which the Defendant's affidavits were filed. The question was sent to this Court; and

BY THE COURT—The Plaintiff in the writ of certiorari, is entitled to file affidavits, after those of the Defendant have been filed, either to confirm those upon which the writ was obtained or to disprove those filed by the Defendant; and he is entitled to a continuance of the cause, to procure such affidavits, if he make it appear to the satisfaction of the Court that he cannot procure them at the term at which the Defendant's affidavits are filed.

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(440)

WILLIAM MUIR'S EXECUTORS *v.* JOHN STUART'S REPRESENTATIVES.

From Halifax.

IN EQUITY.

A Court of Equity has the power to appoint the Clerk and Master of the Court, guardian to infant Defendants, to appear and answer for them; and can exercise this power without the consent of the Clerk and Master.

The death of Thomas Stuart, who had been appointed guardian to the Defendants in this case, being suggested, a motion was made by Complainant's counsel, that the Clerk and Master of the Court be appointed guardian to the infants, to appear and answer for them. The Master refused to accept the appointment, and it was submitted to this Court to decide, Whether the Court could make such appointment without the consent of the Master?

BY THE COURT—This power has been exercised by the Court of Chancery in England, (Nels. Ch. Rep. 44. 2 Ch. Ca. 163,) and no objection can be urged to the exercise of

the power by our Courts of Equity. Much good may result to infants by a proper exercise of it, and no injury can result to the Clerk and Master. Let the appointment be made.

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(441) JOHN HAMILTON *v.* ALLEN JONES'S EXECUTOR.

From Halifax.

An order entered of record for a *scire facias* to issue to make the representative of a deceased Defendant a party to a suit, will prevent an abatement of the suit; for

The order being made, it is the business of the Clerk to issue the *scire facias*, and if he fail to do it, the Plaintiff shall not be prejudiced by his neglect.

The question in this case was, Whether an order entered of record for a *scire facias* to issue to make the representative of a deceased Defendant a party to the suit will prevent an abatement? The facts were, that the death of Lunsford Long, the Defendant, was suggested at the first term after his death, and application was made to the Court at the same term for a *scire facias* to his representative to make him a party. This application was entered of record, and an order made for the *scire facias* to issue; but the *scire facias* was not issued for two terms, and his representative, when called in, pleaded in abatement that no *scire facias had issued* until two terms had elapsed after the death of Lunsford Long. The plea was sent to this Court, and

HALL, Judge, delivered the opinion of the Court:

We are of opinion that the suit has not abated. The act of 1786, ch. 14, sec. 1, declares "that it shall and may be lawful for executors, &c. to carry on every suit or action in Court after the death of either Plaintiff or Defendant; and may be proceeded on by application, in the same manner as appeals are carried on under the act of 1785, ch. 2, sec. 2," which latter act declares, "that no appeal shall be abated by the death of either Plaintiff or Defendant, but may be proceeded on by application of the heirs, executors, &c. of either party." If an application is to be made, to whom (442) can it be made, except to the Court? In this case, it was made to the Court, and within the time required by the Law. That being done, it was the business of

the Clerk to issue process against the executors of the deceased Defendant, to bring them into Court, and make them Defendants to the suit. He has failed to do so. This was not the Plaintiff's fault; he has done all that he could, and ought not to be injured. It is no answer to this to say, that the executors of the deceased Defendant should be made Defendants to the suit, within the time limited by law, by actually serving process on them. This would prove too much; because it will be admitted, that if process had issued and had not been served by the Sheriff, it might issue a second time. Nor does this case resemble one where a party may take out process at pleasure, without making application to the Court. In that case, the party must see that the process is delivered to the Sheriff. In this case, an order having been entered on the record, that process should issue, the Clerk should have obeyed it, without any special application for that purpose. Plea overruled.

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(443) THE STATE *v.* JOHN PATTERSON *et al.*

From Cabarrus.

The Superior Court of one county has no jurisdiction of criminal offences committed in another County, although both of the Counties belonged to the *same Judicial District*, before the act of 1806, ch. 2. For,

Although the *District* Superior Court had jurisdiction of offences committed in each of the Counties composing the District, and the act of 1806, ch. 2, declares, that the Superior Courts of the Counties established by that act, shall have the same jurisdiction which the District Superior Courts had before the passing of that act," yet the object of the Legislature, in passing the act of 1806, being to make the administration of justice more convenient to the people, the words "the same jurisdiction," relate to the *extent or jurisdiction as to subject matters*, and mean, when applied to criminal offences, that a County Superior Court shall have the same jurisdiction of them, if committed within the limits of the County, that the District Superior Court had, if committed within the limits of the District.

This was an indictment for a riot; and the riot was charged to have been committed in the county of Mecklenburg. The Defendants pleaded to the jurisdiction of the Court, the bill having been found in the Superior Court of Cabarrus. The prosecuting officer for the State demurred to the plea,

and the Defendants having joined in the demurrer, the case was sent to this Court.

LOCKE, Judge, delivered the opinion of the Court:

The act of 1806, ch. 2, declares, "that the State shall be divided into six judicial circuits: that a Superior Court shall be held at the courthouse in each county in the State, twice in every year; which Courts shall have the same jurisdiction that the present Superior Courts of Law and Courts of Equity now have and exercise." To ascertain the jurisdiction given by this act, we must examine the jurisdiction given by the preceding acts to the Superior Courts as they existed in the year 1806. The act of 1777, ch. 2, declares,

(444) "that this State shall be and is hereby divided into districts, that is to say, the districts of Wilmington, Newbern, Edenton, Halifax, Hillsborough, Salisbury, Morgan and Fayetteville, in each of which a Court for the trial of causes, civil and criminal, shall be established, by the name of the Superior Court of Law in the district where the same shall be held, which shall have jurisdiction, &c. of all pleas of the State and criminal matters, of what nature, degree, or denomination soever, except that all indictments for assaults, batteries, and petty larcenies, and actions for slander, shall originate in the County Court," &c. This act gives to the district Superior Court jurisdiction over all criminal offences committed within each of said districts. The counties of Iredell, Stokes, Rockingham, Guilford, Montgomery, Cabarrus, Mecklenburg and Rowan, composed the District of Salisbury; and any criminal offence committed in any one of these counties, was to be tried in the district of Salisbury; and if the Superior Court, by the act of 1806, has precisely the same jurisdiction, which before the act, the district of Salisbury had, it would follow that the offence charged in this case to have been committed in the county of Mecklenburg, would be cognizable in the Superior Court of Cabarrus; and the words of the act of 1806, are comprehensive enough to receive such a construction. But we cannot believe that the Legislature intended that the words should receive such a construction; for it would be at variance with the object which they professed to have in view in passing the act, to-wit, the convenience of suitors. The only evil of the district system complained of, was the distance which suitors and witnesses had to travel to the seat of justice; and

to remove this evil, the Legislature declared that the people should have their business transacted in their own counties, where it would be convenient and easy for parties to attend. But if we give to the act the construction contended for, this object will be entirely defeated; for instead of bringing a criminal from the county of Rockingham to Salis-
(445) bury for trial, he might be taken to Mecklenburg, or any other remote county which belonged to the district of Salisbury; and the act which the Legislature passed for the convenience of the citizens, would be found inconvenient and oppressive. The Legislature intended to give to the several County Superior Courts, jurisdiction over the same offences and civil matters which the District Superior Courts had in 1806, limiting the territory within which that jurisdiction was to be exercised to the county in which the Court was held. In all indictments, it must appear that the offence charged was committed within the territorial jurisdiction of the Court. It appears from the indictment in this case, that the riot charged, was committed in Mecklenburg; the Superior Court of Cabarrus cannot take jurisdiction of it. The demurrer must be overruled, and the plea sustained.

WILLIAM ELLIS *v.* GEORGE GEE, Late Sheriff of Chatham.

From Chatham.

A paper writing, upon which a constable arrests a debtor and imprisons him, not running in the name of the State, nor being directed to any ministerial officer, nor purporting to be signed by a Justice of the Peace, cannot be deemed a judicial process; and the Sheriff is not guilty of an escape, in permitting the debtor thus imprisoned, to go at large.

This was an action on the case for an escape. The facts were, that Archibald Briant being arrested by one of the Constables of Chatham County, upon a process purporting to be a *capias ad satisfaciendum*, was committed to the jail of said county, and George Gee being the Sheriff of said county, permitted him to go at large. Upon the trial of the case, the Plaintiff's counsel offered in evidence a warrant sued out at the instance of the Plaintiff against Archibald Briant,
(446) and a judgment entered thereon for the sum of $25. He also offered in evidence the process purporting to

be a *capias ad satisfaciendum*, upon which Briant had been arrested and committed to jail. It was in the following words:

"You are hereby commanded to execute the body of Archibald Briant, and proceed against him as the law directs, where no goods and chattels are found, to raise the sum of $25, with interest.—July 26, 1808.
WM. RAGLAND."

The defence set up by the Defendant's counsel was, that Briant *had not been in prison on execution*. He admitted that a constable had arrested him and put him into prison, and that the Defendant had permitted him to go at large; but he insisted that the paper writing offered in evidence upon which Briant had been arrested and imprisoned, had neither the form nor substance of a *capias ad satisfaciendum*, nor could it be deemed a judicial process to any intent: it did not run in the name of the State—was not directed to any ministerial officer—did not recite nor refer to any judgment which had been recovered, nor did it purport to be issued by a justice of the peace: that therefore, the arrest and imprisonment of Briant had been illegal, and the Defendant was not guilty of an escape in permitting him to go at large. And of this opinion was the Court, and the Plaintiff was nonsuited. A rule to set aside the nonsuit, and grant a new trial being obtained, on the ground that the opinion of the Court was incorrect, the same was sent to this Court; and

BY THE COURT—Let the rule be discharged.

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(447)

ALFRED M'CAY *et al. v.* WILLIAM M'CAY, an infant, &c.

From Rowan.

A. had a child born after he had made and published his will, and in his last sickness enquired of the Physician who attended him, and who was one of the witnesses to the will, "whether he thought him dangerous, and begged for a candid answer, for that his youngest child was unprovided for, and he wished to make some provision for the child." The Physician answered, "that he thought him better, and expressed a wish that he would postpone such a business to some future period." A. died, and it was held, that the birth of the child after the making of the will, together with the declarations of A. to his physician, of his wish to make a provision for the child, did not amount to a revocation of the will.

M'CAY *v.* M'CAY.

This was an issue of "*devisavit vel non*," made up under the direction of the Court, upon a paper writing offered for probate as the last will of the late Judge M'Cay. The facts are set forth in the following special verdict:

"The Jury find that Spruce M'Cay, Esquire, did, on the 23d day of February, A. D. 1803, duly make and publish his last will and testament in the words and figures following, that is to say, &c. And the Jury further find, that the same was executed in the presence of two credible witnesses, no one of whom was or is interested in the devise of the said lands, and attested by them: and that the testator was, at the time of making and publishing said will, of sound mind, memory and understanding. And they further find, that after the making and publishing of the said will, to-wit, in the month of April, 1804, the said testator had a child born of his wife Elizabeth, named William, who is the Defendant and caveator against the will. And they further find, that afterwards, viz., in the fall of the said year 1804, the said Spruce M'Cay was sick, and attended by Doctor William Moore, one of the witnesses to the said will; and that he, in a conversation then had with the said Doctor Moore, asked the said Doctor if he thought him dangerous, and begged the said Doctor to be candid in his answer, for that his youngest child, meaning the said William, was unprovided for, and he wished to make some provision for the said child. Upon which the said Doctor Moore said, he thought him better, and would prefer his postponing such a business to some future period. And they further find, that the said testator, at the time of such conversation, intended to make some provision for his youngest child William. And they further find, (448) that the said testator was much pleased with the said William, called him a fine boy, and was as fond of him as of any other of his children. And they further find, that the said testator, afterwards to-wit, on the 25th day of February, 1808, died without altering or revoking his said will, unless what is stated as aforesaid alters or revokes the same. If, therefore, the Court should be of opinion, that the birth of said child, attended with the circumstances aforesaid, is a sufficient revocation of the said will, then they find, that the paper writing now produced, is not the last will and testament of the said Spruce M'Cay, deceased, and that he did not devise. But if the Court should be of a contrary opinion, then they find that the same paper writing is the last will and testament of the said Spruce M'Cay, and that he did devise."

The foregoing special verdict was sent to this Court for the opinion of the Judges; and

BY THE COURT—We are of opinion that the birth of the child, together with the other circumstances set forth in the special verdict, do not in Law amount to a revocation of the will.*

*This case was tried upon the issue, and the special verdict found at October Term, 1808, of Rowan Superior Court. The case attracted the attention of the General Assembly to the subject, and at their session in November, 1808, they passed an act "to provide for children born after the making of their parent's will."

(449) JOHN STREATOR *v.* NATHANIEL JONES.

From Wake.

IN EQUITY.

Bill to redeem. Complainant charged that he borrowed $800 of Defendant, and to secure the repayment thereof, had executed to Defendant an absolute deed for certain lands; that it was agreed between him and the Defendant, that he might redeem the lands, and that Defendant, upon receiving his money with interest, should reconvey them: but it was agreed that this part of their contract should not be put in writing, and that, *as to it*, Complainant should *trust to the Defendant's word.*" Defendant, in his answer, denied the parol agreement charged in the bill, and set up an absolute purchase of the lands. Held, that parol evidence cannot be received to prove the agreement charged in the bill; for such evidence would contradict the deed of Complainant.

Complainant charged in the bill, that in the year 1799, the Defendant, Nathaniel Jones, advanced to him on loan, the sum of eight hundred dollars; and that for securing the repayment thereof, with 25 per cent. interest, on or before the expiration of that year, he executed to the Defendant an absolute deed for divers tracts of land. That it was agreed at the time the deed was executed, that the lands should be redeemable on Complainant's paying the money borrowed, and twenty-five per cent. interest thereon; that Complainant expressed a wish that a paper writing, setting forth that the lands were redeemable, should be annexed to the deed; but Defendant objected, and said, "Here, take the money you want, and trust to my word:" and that trusting to the word of the Defendant, he executed the deed. The Complainant then charged, that he had continued in possession of the lands until the year 1801, when he was evicted. The bill prayed, that Complainant might be permitted to have an account taken under the direction of the Court, of the principal money advanced to him by Defendant, and the interest which had accrued thereon; that the Court would
(450) decree, that upon the sum thus ascertained being paid to the Defendant, he should reconvey to the Complainant the said lands. The Complainant offered to release the penalty given by the statute against usury, &c.

To this bill, the Defendant filed his answer, and set up an absolute purchase of the lands. He denied that any agreement was made that the lands should be redeemable, and admitting the fact that Complainant retained possession until

1801, alleged that Complainant continued in possession as his tenant, and had agreed to pay a certain rent annually for the said lands, so long as he remained in possession thereof.

The case was sent to this Court upon the question, Whether Complainant could be permitted to prove the parol agreement charged in the bill to have been entered into between him and Defendant at the time the deed was executed, to wit, that he might redeem the land upon paying the money advanced to him, and the interest?

BY THE COURT—The bill does not charge any circumstances of fraud, mistake or accident; nor does it charge that Complainant was a needy man, and that Defendant, knowing his necessitous circumstances, took advantage thereof, and thereby procured an absolute deed, when only a mortgage was intended. The bill states a case of two men, equally free and competent to contract, having made an agreement as to the conveyance of a tract of land, part of which agreement they reduced to writing, and part thereof by mutual consent still rested in parol; and this latter part is in direct contradiction to the former. That part of the agreement which is in writing, sets forth an absolute and unconditional sale of the lands; that part which by mutual consent was not reduced to writing, sets forth that the sale was not absolute, but conditional, and that Complainant was entitled to have the lands reconveyed to him upon his perform-
(451) ing the condition. In other words, the Complainant asks to be permitted to contradict by parol evidence his written contract with the Defendant, and assigns no other reason for this request than that he and the Defendant had voluntarily agreed that the writing should not set forth their contract truly. It would be too palpable a violation of the rules of evidence to permit the Complainant to set up a parol agreement contradictory of the written one. He agreed "to trust to the Defendant's word:" upon that he must still place his trust. This Court can give him no relief. The rules of evidence applicable to this case, are discussed at large in the case of Smith *v.* Williams, decided at this term.

(452) THE STATE *v.* JOHN OWEN.

From Wake.

In an indictment for murder, where the death is occasioned by a wound, bruise, or other assault, *the stroke* must be *expressly laid.* But an indictment, charging "that A. B., with a certain stick, &c. in and upon the head and face of C. D., then and there feloniously, &c. did strike and beat, *giving* to the said C. D. *then and there* with the stick aforesaid, in and upon the head and face of the said C. D., several *mortal wounds*, of which said several mortal wounds, the said C. D. instantly died," is good: for there is in the first clause a direct allegation of a stroke, and the participle *giving* and the words *then and there*, connect this allegation with the mortal wounds in the second clause.

In an indictment charging "that A., feloniously, and of his malice aforethought, assaulted B., and with a sword, &c. *then and there* struck him, &c." the first allegation, of *feloniously and of his malice aforethought*, applied to the assault, runs also to the stroke to which it is essential.

Where in an indictment for murder, the death is charged to be occasioned by *a wound*, a description of the wound must be set forth in the indictment, its length, breadth, depth, &c. where they are capable of description; and the omission of such description, is fatal to the indictment.

Where the death is charged to be occasioned by *a bruise*, a description of its dimensions, &c. is not necessary.

The Defendant being found guilty of the offence charged in the following bill of indictment, it was submitted to this Court, whether sentence of death could be pronounced against him on the said bill?

"STATE OF NORTH CAROLINA, } *Superior Court of Law.*
WAKE COUNTY. } *October Term*, 1809.

The Jurors for the State upon their oaths present, that John Owen, late of the County and State aforesaid, cabinet-maker, not having the fear of God before his eyes, but being moved and seduced by the instigations of the Devil, on the night of the twenty-first day of April, in the year of our Lord one thousand eight hundred and nine, with force and arms, at the city of Raleigh, in the county of Wake aforesaid, in and upon one Patrick Conway, in the peace of God and the State then and there being, feloniously, wilfully, and of his malice aforethought did make an assault; and that he the said John Owen, with a certain stick, of no value, which he the said John Owen in both his hands then and there had and held, the said Patrick Conway, in and upon the
(453) head and face of him the said Patrick Conway, then and there feloniously, wilfully, and of his malice aforethought, did strike and beat, giving to the said Patrick Conway, *then and there*, with the pine stick aforesaid, in and upon the head and face of him the said Patrick Conway, several *mortal wounds*, of which said several mortal wounds, the said Patrick Conway then and there instantly died; and so the Jurors aforesaid, upon their oath aforesaid, do say, that the said John Owen, the said Patrick Conway, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

OLIVER FITTS, Attorney-General."

Seawell, for the prisoner, took two exceptions to the indictment. 1. That in that part which states the mortal wounds, the stroke is only laid by implication. 2. That the indictment does not set forth *the length and depth* of the mortal wounds.*

Potter, for the Attorney-General, argued this case on behalf of the State. As to the first exception. It is laid down as a general rule, that *certainty* is requisite in all indictments; and the reasons given are, 1st. That the prisoner may know against what he has to defend himself: 2d. That it may be a bar to a future prosecution: 3d. That the Court may know the punishment due to the offence; and, by some writers, 4th. That the Court may know what it is that the Grand Jury have found. In Law, there are three kinds of certainty: "Certainty to a certain intent in general; certainty to a common intent; and certainty to a certain intent in every particular. This last is rejected in all cases, as partaking of too much subtility; the second is sufficient in defence; the first is required in a charge or accusation." Co. Lit. 303. a. 4 Com. Dig. 375. 1 Doug. 158. Cowp. 682. Is not the present indictment certain to a certain intent in general? Lord Hale observes, "that abbreviations, such as are usual, are allowable in bills of indictment, and shall be construed singularly or plurally, as makes best for the maintenance of the indictment." 2 Hale Pl. Cro. 170. Hawkins says, "that a defect is helped by the apparent sense of the whole;" (2 Hawk. ch. 23, sec. 89,) and, "that the Law will not suffer a criminal to escape on so trifling an exception as would be absurd and ridiculous to take notice of; for *nimia subtilitas in jure reprobatur*." Id. ch. 25, sec. 61.

(454)

It is admitted that the *manner* of giving the mortal wounds, and *the intent* with which they were given, must be laid positively, or by way of allegation, and not depend upon argumentative certainty. But what is meant by an allegation of the mortal stroke, is explained in Lad's case, (Leach 98,) and is just such an allegation as is made in this bill. Here the charge of giving the mortal stroke, is joined by the copulative *and* to the preceding sentence where the assault is charged, and unites with the "malice aforethought" of that sentence; the words *then* and *there* refer the stroke to the

*The reporter regrets that he is not able to give the very able argument of Mr. Seawell in support of these objections.

time and place of the assault; and the same words following the word *giving*, refer the mortal wounds to the time and place of the assault and striking; the first allegation of assaulting and striking is carried on throughout the sentence. It would have been useless to repeat the stroke where the mortal wounds are charged, for the sense is the same without the repetition. Language is never rendered more perspicuous by tautology. As to the case of poisoning, cited from 2 *Hawk.* c. 23, s. 82, and 2 *Hale* 184, the allegation was, that the deceased "*accepit et bibit*," omitting the words "*venenum prædictum.*" There, it is clear, that the deceased drank the *poison aforesaid*, only by intendment. The precedents in the *Cro. Cir. Com.* 484–5, 491–3, and in the appendix to 4 *Black. Comp.* support the present indictment as to the first exception.

As to the second exception—Why shall the length and depth of the wounds be set forth in the indictment? No reason can be given why they should be described, unless it be to inform the Court that they are mortal. And (455) is not the Court as well informed now as if a more particular description had been given? What additional information could the Court derive as to the mortality of the wounds, from an allegation that they were an inch long and one quarter of an inch in depth? If the wounds had been thus described, and upon the trial it had appeared that the description were incorrect, that the skin of the head had not been separated, the Jury would have been instructed to disregard this variance between the description and the fact. If one man, with his fists and feet, knock and kick another on the body until he die, the wounds or bruises in such cases are never described; and can the Court perceive more mortality in wounds thus inflicted, than in those which are inflicted on the head, by a heavy stick?

The only reason given for describing the dimensions of the wound is, that the Court may be informed that the wound is mortal. Where the reason fails, the law ceases. Where it is impossible to describe the wound, the description is dispensed with. 2 Hawk. ch. 23, sec. 81. There are exceptions to the rule requiring the dimensions of the wound to be described. These exceptions are founded upon principle, and those which we meet with in the books are not put as the *only exceptions*, but as examples illustrative of the principles on which the exceptions are founded. The case of

bruises is not mentioned in the enumeration of exceptions; yet because it comes within the reason, it is held to be unnecessary to describe wounds of that nature. So should it be unnecessary in the present case, because this is the case of bruises, and is in fact so charged; for a wound with a stick is a bruise. "Wound" is a hurt given by violence, no matter with what kind of weapon. "Bruise" is a hurt with something blunt and heavy. Wound includes a bruise. As therefore the present charge is of wounds with a stick, they must be taken to be such wounds as a stick commonly inflicts. Is it competent (456) for the prisoner to object to the use of a word in one of its proper significations? It is admitted on his behalf, that if the word "bruises" had been used in this indictment, instead of the word "wounds," no description would be required: but if every wound includes a bruise, why shall that word, in this indictment, be stripped of its ordinary extent of meaning? The word *wound* is not a technical word; it is one of common parlance. If this word, *ex vi termini*, imported a separation of the skin, and was confined in its signification to injuries of that character, then it might be alleged that it always differed from a bruise, and did not include it. But it is clear, that in common parlance, and also in judicial decisions, *wound* and *bruise* are used as synonymous. In 4 *Com. Dig.* 381, it is said that "*plagam* seu *contusionem* is well." See also 2 *Hale*, 186. If, then, *wound* be not a technical word, (and it is not pretended that *bruise* was ever considered as a word of art) why restrict the Attorney-General to the use of *one* of these words? The Counsel for the prisoner has shewn, that both *plaga* and *vulnus* signify (in Law at least) a *wound* or *bruise*. Then, take the present bill, either by sentences or by its context, and it will be found clear, certain and intelligible. There is much good sense in the remarks of Lord Ellenborough upon the case of "the King *v.* Stephens and Agnew." 5 East Rep. 259, 260. "Every indictment, (says he,) ought to contain a complete description of such facts and circumstances as constitute the crime, without inconsistency or repugnancy; and, except in particular cases, where technical expressions are required to be used, there is no rule that other words shall be employed than such as are in ordinary use; or, that in indictments or other pleadings, a different sense is to be put upon them than what they bear in ordinary acceptation. And if, where the sense may be ambiguous, it is sufficiently marked by the

context, or other means, in what sense they are intended to be used, no objection can be made on the ground of
(457) repugnancy, which only exists where a sense is annexed to words, which is either absolutely inconsistent therewith, or, being apparently so, is not accompanied by any thing to explain or define them. If the sense be clear, nice exceptions ought not to be regarded."

The case of the pirates tried in the Federal Court, before Judge Patterson, if it be law, is decisive of this question. The indictments are filed away among the records of that Court here, and they have been examined. There the Defendants were convicted on two bills: one charging the death to have been produced by a *wound* with an axe on the head, and no dimensions of the wound were given; the other by an axe on the shoulder, and throwing overboard, and no dimensions of the wound by the axe, although the bill did not charge that the death had happened by drowning. As the allegation there was, that the *wound* was given by an axe, a sharp-edged instrument, it was more necessary to describe it, than in the present case, where the wound was inflicted with a stick; yet after argument, the Court held the indictments good, and the convicts were executed.

The Judges were unanimous in opinion, that the first exception taken to the indictment could not be supported; and upon this point,

TAYLOR, Judge, delivered the opinion of the Court:

In endeavoring to form a correct opinion on the points argued in this case, it is the design, not less than the duty of the Court, to conform to the principles of Law, as they are laid down in works of authority. We disclaim all right of giving to them a rigorous construction, to aid the prisoner's acquittal, or of relaxing their true meaning, to effect his condemnation. Like every other citizen in his situation, he is entitled to the full benefit of the constitutional provisions, devised to promote the security of all: and though the most atrocious criminality may have been proved to the
(458) satisfaction of the Jury, yet legal condemnation ought never to be separated from legal proofs. And we cannot too strongly impress it on our minds, that want of the requisite precision and certainty, which may, at one time, postpone or ward off the punishment of guilt, may, at another, present itself as the last hope and only asylum

of persecuted innocence. It must, however, be confessed, that there is, in the ancient reasoning on this branch of the Law, a degree of metaphysical and frivolous subtilty, strongly characteristic of the age in which it was introduced; when at the revival of letters, the first efforts of learning were laborious and rude, and scarcely a ray of common sense penetrated the clouds of pedantry. Were a system now to be established, it is probable that much of the jargon of the Law would be exploded, and that no objection would prevail against an indictment, or any other instrument, which conveyed to the mind, in an intelligible form, its intended impression. But we must follow in the footsteps of those who have preceded us, until the Legislature think fit to interfere; though we have no wish to extend the particularity further. On this subject, the sentiments of an eminent Judge have been properly read by the Counsel for the State; since, although he was conspicuous for his tenderness to criminals, as well as for every manly and christian virtue, yet he condemned this nicety as a reproach to the laws. We would also refer to the opinion of another illustrious man delivered a century afterwards; a man who had devoted a long life to the cultivation of the science he so ably dispensed.

The first exception taken to this indictment is, that in that part of it which states the mortal wound, the stroke is only laid by implication.

The rule laid down by the writers is, that where the death is occasioned by a wound, bruise or other assault, the stroke should be expressly laid. In every case, however, where the objection has been heretofore taken, there is an omission of the express charge of the stroke, in that part of the indictment wherein it is charged in this. In Long's (459) case, 5 Co. Rep., the word "*discharged*" is used. There seems to be no case, where a repetition of the stroke is required after the participle *giving*, if it has been directly charged in the preceding clause.

A critical examination of Long's case, supposing it to be of good authority, which is by no means certain, will shew that instead of supporting, its tendency is to repel the exception in this case. The material words of the indictment, necessary to be taken into view, in Long's case, were "that the aforesaid H. D. a certain pistol, &c. loaded with powder and a leaden bullet, &c. in and upon the said H. Long discharged,

giving to the said H. Long then and there with the leaden bullet aforesaid, so as aforesaid sent forth from the said pistol by the said H. D. one mortal wound, &c." The Court in giving judgment, divided the objection into two parts: 1st, the clause before the words "giving him:" 2d, the clause containing these words: and they resolved that the first clause was not sufficient of itself; for although H. D. discharged the pistol upon him, it may be that he was not struck by it. Then the second clause cannot make it good, for the clause of "giving," &c. depends on the said first clause, and describes the wound only to shew it to be mortal, which ought to appear by the first sentence to be given; because in that case, the participle determines the verb. But here it did not appear by the first clause that a stroke was given, and then "giving," &c. cannot supply it; for that is a participle depending upon the verb precedent, and the verb precedent is "discharged," and "discharged" may be without a stroke. Although the grammar and logic of that case are refined, yet the Court do not in their reasoning intimate the necessity of inserting *after* the participle "giving," the manner, the *quo modo* of the wound. Their opinion is, that if there had been a direct allegation of a stroke in the first
(460) clause, the participle "giving" would have connected it with the second clause, and made the indictment good. But the decision was not approved of in after times; for Lord Holt said, that by his consent they would not be so nice again, and that there was not a case in the law like that; and its authority is admitted to be considerably shaken in a recent case.

To sustain this exception, would be to establish a precedent more exceptionable than that in Long's case; and instead of promoting perspicuity and simplicity of language in indictments, would seem only to introduce tedious and perplexing tautology. Yet this is not required even in the statement of those terms of art so peculiarly appropriated to the description of particular offences, that they cannot be supplied by any circumlocution. For where the indictment charged that A. feloniously and of his malice aforethought assaulted B., and with a sword, &c. *then and there* struck him, &c. the first allegation of *feloniously and of his malice aforethought* applied to the assault, ran also to the stroke to which it is essential. An indictment against Mary Nicholson for poisoning Elizabeth Atkinson, stated that the prisoner did

wilfully, feloniously, and of her malice aforethought, mix poison, viz. white arsenic with flour and milk, with the intent that the same should be afterwards taken and eaten by the deceased, *and* the said flour and milk so mixed with the poison as aforesaid, *then and there delivered to the deceased.* &c. This was holden sufficient by all the Judges, without adding the words "feloniously and of her malice aforethought" to the allegation of delivering the poison. For they considered that these words ran by the word "*and*," and the words "*then and there.*" But if the sentence had not been so connected, a different construction would have prevailed.

The indictment before us contains a direct allegation of a stroke accompanied with the necessary terms of art, and all the sentences are connected together by the words *and* and *then and there:* so that in all these respects it bears
(461) the strict form of carrying forward from one sentence to another the criminal charge. Further repetition might have obscured, but could not have illustrated the charge, nor could it have brought the indictment nearer to the most approved precedents. On this point, therefore, the Court are unanimously of opinion against the prisoner.

As to the second exception, the Judges were divided in opinion: HALL, LOWRIE and HENDERSON being of opinion that the exception was fatal to the indictment, and that sentence of death could not be pronounced against the prisoner upon the indictment, in consequence thereof; TAYLOR and LOCKE, being of a contrary opinion.

HENDERSON, Judge, observed, that if the Court were now about to decide on the propriety of requiring the dimensions of any wound charged in an indictment to be mortal, to be set out, he should be clearly of opinion that it was unnecessary. But as immemorial custom, and all the authorities have determined, though not for reasons satisfactory to his mind, that wherever a death is stated to be occasioned by a *wound*, that the length, breadth and depth of the wound should be described, where they are capable of description; and as the word *wounds* is used in this indictment, the dimensions of those wounds ought to have been stated. The Judge observed, that a precedent had been produced from *West's Symbolcography*, which did not seem to make this necessary: but this was not an authority; it was a mere precedent, upon which no judgment had passed, and the omission might

have been by mistake. On examining all the books, he could find no authority where a death is charged in an indictment to be produced by a wound, that the dimensions of the wound are omitted. It is not for the Court to determine why this description is required; it is enough for
(462) them to know, that the law does require it; and believing both from authority and precedent that this was the law, he felt it to be his duty so to pronounce it.

LOWRIE, Judge, had but little doubt, if this indictment were submitted to the opinion of men unlearned in the law, it would be their unanimous opinion that the description of the manner in which the deceased came to his death was sufficiently set forth. But if the law has said otherwise, though the Court may not see the reason upon which the law is founded, they must be bound by it. It appears from the books, that wounds capable of description, must be described, that the Court may judge whether it be probable, that death might have been produced by them. It appears probable, that in this case, Conway might have come to his death by the strokes stated to have been given; but the dimensions of the wounds being required, they cannot be dispensed with. The authorities to this point stand uncontradicted, except by *West* in his precedents, which, for the reasons stated by his brother HENDERSON, ought not to set aside the others. All the exceptions to this rule, are cases where the wound cannot be described, such as where a limb is cut off, or the body run through. He thought the exception was fatal to the indictment.

HALL, Judge, said it was unnecessary for him to add much to what had been said by his brethren, HENDERSON and LOWRIE. But it might be asked what the Common Law of England was, when it was adopted by this country? for such as it was, it must be observed. It had been very properly remarked, that if the Court were not met to determine in what manner indictments of this kind should be formed, this strictness would not be required. Any one proposing that wounds should be described as laid down in the books, would be considered as evincing but little knowledge
of legislation. The reason given by writers for ob-
(463) serving this particularity is, that the Court may see that the wound is such as might produce death. The causes of death appeared to be laid with sufficient cer-

tainty in this indictment: but as we find, from all the authorities, from *Coke* to *East*, that whenever death is stated to be produced by a wound, the dimensions of the wound must be given, it cannot now be dispensed with. It appears from *West*, that the law was not formerly so: but this was the law when the Common Law of England was introduced here. All modern writers agree that the dimensions of the wound must be stated; not for any good reason, be admitted; but it was not for the Court to legislate, but to decide, as they had sworn to do, according to the law. The exceptions stated in the books, prove the rule. When bruises or blows are stated, no dimensions are necessary: but where a wound is laid, it has been an invariable custom to state its dimensions.

TAYLOR, Judge, said he was sorry that it was not in his power to concur in the opinion delivered by his brethren. He, however, could place but little confidence in his own opinion, since it was different to-day, from what it was yesterday. He then thought the indictment could not be sustained; but upon a more careful examination of authorities, he now thought otherwise. He had looked in *West's Book of Precedents*; and though, as has been stated, precedents only shew the opinions of the writers, yet all precedents which are brought into argument are of the same authority. Their weight depends much upon the age in which they were written, and the character of the writers. Such as they are, they had induced him to change his opinion. (He here read from *West* the indictment produced by the prisoner's counsel.) Looking further into the book, he found a precedent, where a person is charged with striking with a club: he is stated to have struck, wounded, and maltreated the deceased, who languished and died, but there is no description of the wound. He found another prece-
(464) dent, where a person is charged with striking, wounding, and maltreating the deceased, without describing the wound. From these precedents it appeared, that the writer did not consider it necessary, when a wound was inflicted with a club or a stick, that it should be particularly described. These precedents had induced him to look into the English Common Law, by which his opinion was confirmed.

He said he had read what *East* says on the subject, where

he states that in all cases of doubt, a statement which shews that death might ensue, is sufficient; and had asked himself, whether the wound given to Conway is so described in the indictment, as probably to occasion death? The answer was in the affirmative.

This indictment, he observed, is in the same words with the precedents in *West*, except as to the word "maltreated," which is found in the latter, and which is of no consequence.

Finally, he said, he came to this conclusion, that wherever the death was occasioned by a cut with a sword, dagger, or other edged instrument, it is necessary to state the dimensions of the wound: but when the death is occasioned by a club, cudgel, or stick, it is sufficient to state the wound, without the dimensions. He, therefore, was of opinion, that the exception to the indictment could not be sustained.

LOCKE, Judge, agreed entirely with the opinion delivered by his brother TAYLOR, for the same reasons, and from the same authorities quoted by him, and which he deemed it unnecessary to repeat.

The indictment being adjudged insufficient, by a majority of the Court, the prisoner was remanded to jail to answer the same charge upon another bill of indictment to be preferred against him.

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(465) THE GOVERNOR *v.* HENRY B. HOWARD.

From New-Hanover.

The repeal of an act of Assembly giving a forfeiture for an offence, is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary.

A. sues B. for the forfeiture of £100, given by the act of 1794, for buying a slave knowing him to have been imported contrary to that act. Pending the suit, this act is repealed, and the repeal is pleaded in bar. The plaintiff demurs to the plea. The demurrer overruled, and the plea allowed.

This was an action of debt, to recover the sum of one hundred pounds, as a forfeiture for having bought a slave, knowing the same to have been imported into this State, contrary to the act of 1794, ch. 2. Pending the suit, and after issue had been joined therein, the act of 1794, ch. 2, was repealed;

and at the next term of the Court after this repealing act was passed, the Defendant pleaded it in bar, by way of a plea since the last continuance. To this plea the Plaintiff demurred; and the Defendant having joined in demurrer, the case was sent to this Court, upon the question, Whether the demurrer should be sustained; or should be disallowed and the plea sustained?

HALL, Judge, delivered the opinion of the Court:

It is laid down in *Cro. Eliz.* 138, that the Attorney-General cannot enter a *nolle prosequi* to an action *qui tam*, except for the King's part of the penalty; nor can the King after action commenced, release any but his own part of the penalty. 2 Bl. Com. 436. 11 Co. 65. But it is in the power of Parliament to release the informer's interest. 2 Bl. Com. 436. If so, they surely have the power of taking away the informer's right of action, by repealing the act which gave birth to it. It is said (Wm. Bl. 451) in Sir *William Blackstone's Reports*, "that no proceeding can be had or
(466) pursued under a repealed act of Parliament, though begun before the repeal, unless by special exception." And by Sir Matthew Hale (Hale P. C. 291), "that when an offence is made treason or felony by an act of Parliament, and then that act is repealed, the offence committed before such repeal, and the proceedings thereupon are discharged by such repeal." From these authorities, and others which might be referred to, as well as from the circumstances that the suit in the present instant must be brought in the name of the Governor alone, (the act having directed the forfeiture to be sued for in his name) although after a recovery one moiety thereof is to go to the informer or the person who brought the suit. The demurrer must be overruled and the plea allowed.

JAMES DUNCAN AND WIFE *v.* THE ADMINISTRATORS OF PARISH SELF, Deceased.

From Chatham.

A gift of a chattel to a person, with a reservation to the donor of a life estate therein, is good, and vests a property in the donee in the event of his surviving the donor.

DUNCAN *v.* SELF.

Parish Self made a gift by parol of a negro girl slave to his daughter Elizabeth, reserving to himself the said negro during his life. He kept the said negro in his possession until his death, and his daughter survived him. She having intermarried with James Duncan, this action of detinue was brought by them against the administrators of the estate of Parish Self, to recover the said negro girl. The Defendants insisted that no title vested in Elizabeth, the daughter, by the gift; that the reservation of the property to the donor during his life, was in fact, a reservation of the entire interest in the negro, and nothing was left for the daughter, inasmuch as the law will not allow a remainder to be created in a chattel after a life estate, except it be done by ex-
(467) ecutory devise, or by deed of trust. The case was sent to this Court, upon the question, Whether the gift vested such an interest in Elizabeth, the daughter, as enables her husband and herself to recover the negro.

BY THE COURT—We are of opinion, that the daughter, Elizabeth, having survived her father, the donor, the property in the negro girl vested absolutely in her at his death, and that the Plaintiffs are entitled to judgment.*

*The decision in this case has been thought to militate against the rule of the Common Law which forbids the creation of future interests in a chattel after a life estate therein, except by executory devise, or by way of trust. It is to be regretted, that the Court did not assign at length, the reasons upon which their decision was founded; but it will be seen, from a consideration of the principles upon which it is probable their decision was made, that it does in no wise impugn the rule of the Common Law. The case of Tims *v.* Potter, 1 *Hayw.* 234, 275, is the leading case in our Courts upon this subject. Glover gave a negro girl to his daughter, reserving to himself a life estate in the said negro. The daughter survived the father, and after his death brought an action of detinue to recover the negro and her increase. The principal question upon the trial, was, Whether the Plaintiff was entitled to the children of the negro girl, born during the life of Glover, the donor? The validity of the gift to the daughter was not questioned. Various other cases have occurred since that time, similar to the one of Tims and Potter, and the Courts have considered the gift as vesting an estate in the donee; and the Courts have probably proceeded upon one or the other of the following grounds: 1st. That where one person gives a chattel to another, reserving therein a life estate, the Law deems the gift a present one, in case the donee survive the donor, and to take effect in possession in that event; but that the interest of the donee during the life of the donor, is a *mere possibility*, which is not transmissible to the representatives of the donee; and that if the donor survive the donee, the interest in the chattel remains entire with him, and goes to his representatives. And this possibility differs from a contingency; the first having no actual existence till a certain event happens; the second having an actual exist-

(468) RICHARD RUSSELL *v.* PRESLEY HINTON.

From Warren.

A person summoned as a garnishee may avail himself of any defence which he could make, were he sued by his creditor.

A. summoned as a garnishee in a suit between B. and C., declared that he had given his bond to C. for £870; that the debt really due at the time was only £801 15s; that the bond was given upon an usurious consideration, and therefore void. B. urged A. to make some contract with C. for taking up this bond, assuring him that he might have confidence in C's integrity, and that if he would make such contract, C. would certainly pay to him B., the debt which he owed to him; and A. believed from B's representations, that if he made this contract, he would not be called upon by B. as a garnishee. A. agreed by a day certain to take up his bond and make payment to C., upon his deducting 12½ per cent. from the amount thereof. After this contract was made, but before the day of payment agreed on, B. sued out an attachment against C., and A. was summoned as garnishee. Notwithstanding this summons, A. complied with his contract with C. and paid the money on the day. On this garnishment, no judgment of condemnation will be entered, and the garnishee shall be discharged.

Richard Russell sued out an original attachment against Edward P. Davis, then residing in the State of Virginia, and

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ence, which may or may not take effect. Upon this principle, if Parish Self had survived his daughter, the negro girl would have belonged to him in absolute property, as before the gift, and would have gone to his administrators after his death, his daughter having nothing during his life but a mere possibility: but in the event of her surviving her father, the gift took effect in possession. The interest and estate in the negro were not out of the father by the gift: he parted only with a possibility of interest, which was to take effect or not, as the event should happen of the daughter surviving him or not.

The case of Roberts, administrator, &c. *v.* Polgrean, 1 *Hen. Black.* 536, illustrates the above principle, and shews that the cases of Tims and Potter, and Duncan and wife *v.* Self's administrator, do not militate against the rule of the Common Law, which forbids the creation of future interests in a chattel after a life estate therein, except by executory devise or by deed of trust. In that case, the limitation of a term was, "to Mary Rawles, *during her natural life*, with remainder to her son William Rawles, and his issue lawfully begotten: and in default of issue of said William Rawles, then to Elizabeth Polgrean, (the Defendant,) daughter of the said Mary Rawles, *during her natural life*, with remainder over." Mary Rawles conveyed the premises during the remainder of the term, to her son William Rawles, his executors, administrators, &c. William Rawles then by deed of indenture conveyed the premises to "Margary Coles and her heirs, *immediately after the death of him the said William*, to hold the same to her and her heirs forever." Williams Rawles *survived* Margary Cole, and died *intestate* and *without issue*, and administration on his estate was granted to Elizabeth Polgrean (the Defendant.) Margary Cole died intestate, and administration on her estate was granted to her daughter, Mary Roberts. The suit was brought by Mary Roberts, as administratrix of the estate of Margary Cole, to recover the possession of the leasehold premises, claiming un-

Presly Hinton was summoned as a garnishee, to de-
(469) clare whether he owed said Davis, and if so, to what amount. Hinton appeared, and in his garnishment stated, that some time in the year 1804, he purchased from Davis a tract of land, paid down part of the purchase money, and gave six separate bonds to secure the balance; three of which bonds he had discharged, and as to the other three, he not finding it convenient to pay them as they became due, had entered into a contract with Davis to allow him more than six per centum per year upon the money, provided Davis would prolong the time of payment; and the three bonds amounting to £801 15*s.* 0*d*, currency of Virginia, had been surrendered to him, and he had given a new bond to Davis for the sum of £870, like money, and a longer time for payment had been given. He declared this last bond

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der the deed made by William Rawles to Margary Cole: and two points were decided by the Court,

1. That the deed from William Rawles to Margary Cole must be construed to be a present gift to the wife, in case she survived her husband, to take effect in possession on that event; and that William Rawles, the donor, having survived Margary Cole, the donee, the whole interest in the term survived, or rather remained in him.

2. That this interest vested, upon William Rawles' death, *in his representative.* Elizabeth Polgrean was the person to whom the term was limited originally in default of issue of William Rawles; yet the Court said she could claim nothing under this limitation, but held the term in her character of administratrix of William Rawles's estate.

This case shews, that in all such cases as Tims *v.* Potter, and Duncan and wife *v.* Self's administrators, the donor remains possessed of his former absolute estate in the chattel: that his estate therein is not abridged by the gift, from an absolute interest to an interest for life; that the donee takes by the gift neither a vested nor contingent remainder, but a mere possibility, which may take effect or not, as the donee happen to survive or not survive the donor.

This case seems also to recognize the rule, that by deed, (not of trust) a chattel cannot be limited over after an estate for life, and that the estate for life absorbs the entire interest in the chattel. It would seem that it was upon the operation of this rule, Elizabeth Polgrean, the Defendant, was adjudged to hold the term in her character of administratrix of William Rawles's estate, and not in her own right under the ulterior limitation contained in the first deed. For, by the first deed the term was limited "to Mary Rawles *during her natural life*," and then over to William Rawles, and his issue lawfully begotten, and in default of issue of said William Rawles, to Elizabeth Polgrean during her natural life. As William Rawles died without issue, the term would have belonged to Elizabeth Polgrean under this limitation, had not Mary Rawles, *the donee for life*, taken the absolute interest; for the limitation over is not too remote, it being to take effect within the compass of a life in being, it being "to Elizabeth Polgrean during her natural life," and is the same as the Duke of Norfolk's case. The Court held, that Elizabeth Polgrean could claim nothing under this limitation. Mary

was given upon an usurious consideration. He
(470) further stated, that some time after this new bond was given, Davis came into this State, and that Davis, Russell and himself had frequent conversations upon the subject of the debt due by Davis to Russell, and also of the debt due by himself to Davis; that Russell urged him to make some other contract with Davis whereby the bond to Davis might be taken in, or as Russell expressed it, purchased in; alleging that he, Russell, had full confidence that in that event, Davis would discharge the debt due to him. That in consequence of Russell's persuasions and solicitations, he made a contract with Davis for the taking in of said bond, believing from Russell's representations that he would discharge him from any garnishment in relation to the said bond. That shortly after he had made his contract with Davis as aforesaid, Russell sued out this attachment and had him summoned as a garnishee; that notwith-
(471) standing this summons, he had fulfilled his contract with Davis, and had paid to him five hundred pounds. Being asked what were the terms of the last contract between himself and Davis, he answered, that he proposed to Davis to take up the bond by a day certain, if Davis would discount twelve and an half per cent. thereon, and pay him part in cash, part in tobacco, and assign to him bonds on demand for the balance; that Davis acceded to this proposition, and the day of payment happening after he had been summoned as a garnishee in this case, he had, notwithstanding the summons, complied with his agreement and made the payment. Upon this statement of facts, it was submitted to this Court to decide, Whether the Plaintiff was entitled to judgment of condemnation against the garnishee?

LOCKE, Judge, delivered the opinion of the Court:

The garnishee has stated at full length, the nature of the debt, and the amount thereof, due to Davis at the time he was summoned at the instance of the present Plaintiff, and

Rawles, the donee for life, conveyed her interest in the term to her son William Rawles, and under this conveyance, he became possessed of the entire interest, and Elizabeth Polgrean having administered on his estate, she was adjudged to hold the term as his administratrix.

2d. The Courts may have proceeded upon the ground that the reservation for life was inconsistent with the gift, and therefore void. This was the view taken by this Court of such a reservation, in the case of *Vass and wife and others* v. *Hicks*, decided at May Term, 1819.

the last contract made with Davis, under which he has paid the five hundred pounds which the Plaintiff prays may be condemned for his use. He submits to this Court how far he is liable to the Plaintiff's demands. To determine the extent of this liability, it may be necessary to consider it on the ground of the debt due to Davis at the time he was first summoned: and, secondly, on the ground of his second contract, by virtue of which the first debt was extinguished or surrendered to the Defendant. As to the first, it is a general principle, that a garnishee, when summoned by the Plaintiff in attachment, is entitled to make every defence against such Plaintiff, that he would be entitled to make against the original contracting party, had he brought suit. For it is rather a case between them, than between Plaintiff and garnishee; in as much as the Plaintiff's right to recover must (472) depend on some existing debt between garnishee and his creditors. If, then, Davis had brought an action of debt upon the bond for £870, and Hinton had pleaded the statute of usury, (as he has virtually done here,) and the evidence shewed to the Jury that Davis had reserved to himself eight or ten pounds for the forbearance of every hundred pounds attempted to be secured by the bond, the Jury must have found that the bond was given on an usurious consideration, and therefore void: and if void as between Davis and Defendant, will be equally so between Defendant and Russell. On that part of the garnishment, therefore, no doubt can be entertained.

But it is alleged, that as Defendant, by virtue of a second contract, and after he was summoned as a garnishee in this case, has paid over to Davis five hundred pounds, he is liable to the Plaintiff for that amount. This part of the case seems to indicate more than usual skill on the part of the Plaintiff, to circumvent and ensnare an honest, unsuspecting man. At whose instance was this second contract made? Did it not proceed from the intimations of the plaintiff himself? He recommended this measure to the Defendant, at the same time assuring him that he had full confidence in the integrity of Davis, and if this contract was made by Defendant, he felt certain that the debt which Davis owed him, would be paid. He did not say, in express terms, that Defendant should be discharged from his garnishment: but his mentioning, that if Defendant made the contract, he had full confidence that Davis, in that event, would pay his debt;

that owing to these solicitations of the Plaintiff, the contract was made, and in full confidence that Russell would look to Davis for his debt, and discharge Defendant, seem to be tantamount to an express discharge. For, if Defendant was or could be liable, there was no necessity to place any confidence in Davis, because the Plaintiff had the Law on his side to compel a payment from Defendant, let Davis
(473) act in any way he pleased. But the case has impressed a belief upon the minds of a majority of the Court, that Plaintiff, knowing the bond to be usurious, and therefore his remedy gone against the garnishee, induced the Defendant to change the nature of his debt to Davis, under a belief which he artfully enforced, that if Defendant did so, he should not be called upon as a garnishee; and having induced Defendant to make a positive contract with Davis, a contract which, he well knew, Defendant would feel himself bound in honor to comply with, he would lay hold of that circumstance to compel a second payment by Defendant, by calling upon him as garnishee, after he had promised to Davis the payment of the money in such way, that Plaintiff well knew as an honorable man he could not decline the payment. If, then, the Plaintiff has made such declarations of his reliance upon the integrity of Davis, as to induce Defendant to pay such sum as was really and honestly due to Davis, but of which Davis had no legal means of compelling payment, he cannot afterwards have any claim on Defendant. If he should be made liable, he would be compelled to pay this debt twice, when, without the advice and influence of the Plaintiff, he was not liable to pay any part of it. The statute of usury shielded him effectually. The Defendant cannot recover back the money which he paid to Davis, supposing it to have been paid upon an illegal consideration. 3 Term Rep. 266; Doug. 468. We are therefore of opinion, that no judgment of condemnation ought to be rendered against the garnishee, and that he ought to be discharged.

HALL, *Judge*, *contra*.—I think now as I did in the case of Gee *v.* Warwick, 2 Hay. 354, that a garnishee has a right to avail himself of any legal defence which he might have in his power, were he sued in an action at Law by his creditor. If, in the present case, the debt due by the Defendant to

Davis, was contracted upon an usurious considera-
(474) tion, it would furnish a good plea to the Defendant in an action brought by Davis to recover it. The rights of the debtor are not impaired by the absconding of the creditor: but to answer the purposes of justice, the rights of the creditor so absconding, are, by our act of Assembly, transferred to others to whom he is a debtor. In such case, the garnishee is under the same moral as well as legal obligation to pay any debt to the Plaintiff, the creditor of his creditor, that he felt himself bound by to pay it to his creditor before he absconded. The Plaintiff's claim, in this case, is as strong upon the Defendant, as if Davis had assigned the bond in question to him. Although the garnishee may have a good defence against a recovery upon the bond, founded upon the act of Assembly made to prevent usurious contracts, he ought not, after having voluntarily relinquished it as to Davis, to be permitted to shelter himself under it as to Russell. He was under no tie, legal or moral, to pay a cent to Davis; but, except as to this defence, he was under both to pay it to Russell. If he was disposed not to retain another man's money unconscientiously, he should have well considered whose money it was. His conduct to Davis proves very clearly, that he did not intend to avail himself of that defence, but to pay what was really due. But he paid it to a person who was not entitled to receive it either on equitable or legal principles. The Plaintiff ought not thereby to be injured. In short, I think, that as the garnishee has relinquished the only defence he had at Law, (which is fully evinced by his second contract with Davis) he stands, as to the present Plaintiff, as if such defence never had been in his power; and that having paid the money to Davis, he paid it in his own wrong, and of course should be compelled to pay it again, to the Plaintiff, whose moral right to receive it cannot be questioned, and whose legal claim to it the Defendant should not be permitted to dispute, after having renounced the benefit of the only plea which, from his
(475) garnishment, he could with any success have relied upon.

JAMES EXUM *v.* HYDER A. DAVIE AND WIFE, and HARWOOD JONES.

From Northampton.

A. devised his manor plantation to his son B. in trust, to apply and pay over the rents and profits to another son, C. during his life, and after the death of C. he devised the plantation to B. in fee simple. In the year 1790, B. conveyed the plantation to C. in fee, with a proviso, "that if C. should die without a child or children, the plantation should revert to B. and his heirs." B. died in 1794, intestate, leaving two children, D. a son, and E. a daughter. At the time of his death, D. his son was heir at law. In 1795, the Legislature declared that sisters should be admitted to inherit lands equally with the brothers, to hold with the brothers as tenants in common. In 1798, C. died without leaving any child: and a question arose, Whether D. who was the heir of his father at the time of the descent, or D. and E. who were the heirs at law at the time the reversionary interest of the father fell into possession, were entitled to the rents and profits of the plantation.

Held, that E. was entitled equally with D.: for whoever claims a fee-simple by descent from one who was first purchaser of the remainder or reversion expectant on a freehold estate, must make himself heir to such purchaser at the time when such remainder or reversion falls into possession.

And the pleadings in a writ of Formedon in Remainder or Reverter, shew that he who is heir at the time of the contingency happening and the lands falling into possession, is to take, and not he that is heir at the death of the first purchaser or donor. For in Formedon in Descender, the Court stating the gift to the first donee, expressly avers a descent from him to A, his son and heir, then to B, his son and heir, and then to the Demandant, his son and heir. But in Formedon in Remainder and Reverter, the Court only avers the happening of the contingency on which the lands were to go over or revert, and that on its happening, the lands ought to go over or revert to the Demandant, who now claims as cousin and heir of the first purchaser or donor.

The interest of the first purchaser of a remainder in fee, or the donor of a reverter in fee, is to him *and* his heirs forever; and on his death whatever interest vests in his heir, is to him and *his heirs* for-
(476) ever. This interest, although vesting in the heir of the first purchaser or donor and his heirs, is subject to be divested out of *his heirs* by any subsequent event which makes them not heirs to the first purchaser or donor *at the time when the reversion falls in.* As the law of descents has not been changed in England, the books show no case decided there, in which the estate has by any subsequent event been divested out of *the heir* of the first purchaser or donor in whom it has once vested; and therefore, if the remainder or reversion once vested in him, he continued *to be heir* to the first purchaser or donor, at the falling in of the reversion, if he so long lived; but such heir does not take an interest to himself and another to his heirs; and as the interest which he takes *to his heirs* is liable to be divested by subsequent events, making *his heirs* not heirs to the first purchaser or donor at the time when the remainder or reversion falls into possession, so *his* interest may be divested by a public and general law, making *him* not heir to the first purchaser or donor at the time when the remainder or reversion falls in.

EXUM *v.* DAVIE.

Here the reversionary interest fell in in 1798, at which time the act of 1795 had made D. not the sole heir to the donor, and had declared that D. *and* E. should *then* be considered heirs to him. And it is a common case in law for lands to vest in one *sub modo* only, so as to be divested by a subsequent event, and vested in another. It occurs,

1. *Ex institutione legis* in every instance where on the death of a tenant in fee or in tail, his lands descend to his daughter, uncle, &c. and afterwards a son is born, who shall enter upon the daughter, &c. and divest the estate which she took by descent.
2. *Ex provisione hominis;* as where lands are settled or devised to the use of the husband and wife for life, remainder to such one or more of their children as they shall appoint; and in default of such appointment to all their children as tenants in common. There on the birth of one child, the remainder vests solely in it; but on the birth of the second, and so on *toties quoties;* and if the father and mother make an appointment, then the whole remainder is divested out of the children as tenants in common, and vested according to the appointment.

So if on the death of B. an interest vested in his son D, one moiety of the interest was divested by the act of 1795, and D. and E. became entitled each to a moiety of the lands, and of course to a moiety of the profits.

Harwood Jones devised his "manor plantation, and all the land adjoining the same, to his son John Jones, in trust, to apply and pay over annually the rents and profits of the same to the use of another son, Harwood Jones, for and during his natural life; and after the death of the said (477) Harwood, (the son,) to John in fee simple." In the year 1790, and shortly after the death of Harwood Jones, the devisor, John Jones conveyed the said manor plantation to his brother Harwood Jones, in fee, with a proviso, "that if the said Harwood Jones should die without child or children, the said manor plantation should revert to the said John Jones and his heirs." Harwood Jones died in 1798, without leaving any child or children, or the issue of such; and John Jones died in the year 1794, intestate, leaving two children, Harwood, and Elizabeth, since intermarried with Hyder A. Davie. James Exum was appointed guardian to the said Harwood and Elizabeth, and received the rents and profits of the said manor plantation; and not being able to determine who was entitled to the said rents and profits: whether they belonged exclusively to Harwood, or were to be divided between him and his sister Elizabeth; and as Mr. Davie, in right of his wife Elizabeth, claimed the moiety of the rents and profits, he filed this bill in the Court of Equity for Northampton county, against Harwood Jones, and Hyder A. Davie and Elizabeth his wife, to compel them to interplead, settle and adjust their rights and demands, between

themselves, so that he might be enabled to pay the said rents and profits with safety to himself. He appended to his bill the usual affidavit that he did not file the bill in collusion with either of the Defendants, but from a desire to avoid being doubly vexed concerning the matters contained therein.

The Defendants put in their answers: Harwood Jones insisting that the whole rents and profits belonged to him; and Hyder A. Davie and wife insisting that one moiety thereof belonged to them. The case was sent to this Court upon the bill and answers, for the opinion of the Judges. The case was argued by *Fitts* for Harwood Jones, and by *Browne* for Hyder A. Davie and wife.

The argument relied upon for Harwood Jones is
(478) noticed by *Browne* in his argument for Davie and wife.

Browne, for Davie and wife.—The first questions which present themselves in this case, are, 1st. Whether the heirs of John Jones are entitled to the lands, the profits of which are now in controversy? and 2dly, if they be entitled, Who are his heirs?

By the will of Harwood Jones the elder, his son Harwood Jones was tenant for life, with a clear remainder to his other son John Jones. But John Jones, by deed of bargain and sale, conveyed the said lands to his brother Harwood in fee, "Provided nevertheless and upon this express condition, that if the said Harwood Jones should depart this life without a legitimate child or children, then in that case, the said lands, &c. are to revert to and become the property of the said John Jones, his heirs and assigns for ever, in as full and ample a manner, to all intents and purposes, as if this present indenture had never been made." If this had been a feoffment or other common Law conveyance, the feoffee would have taken a fee-simple on condition. *Co. Lit.* 203, *a*— 204, 331, 371, 372. And on his dying without child or children, the feoffor might have entered and been seised of his former estate. *Co. Lit.* 325, 202, *a*.

A condition may either confirm or defeat a fee-simple. *Co. Lit.* 207, *a*.

But this conveyance was a bargain and sale to operate by the statute of uses—2 *Bl. Com.* 338; and on such conveyance a fee may be limited on a fee, provided the contingency

on which it is so limited is not too remote. The Duke of Norfolk's case arose on a deed, and was a springing trust after an estate-tail in a term. An estate-tail in a term gives the whole interest therein, because it cannot be docked by fine or recovery, and so tends evidently to perpetuity. Fearne's Essay on Remainders, &c. 5, 349, 414. A common recovery suffered by tenant in tail barred all remainders and
(479) reversions on account of the supposed recompense. 2 Bl. Com. 360. But conditions, conditional limitations, shifting uses and trusts, resulting uses and trusts, &c. which were only to have operation after the termination of a fee-simple, being of no value in the eye of the law, no recompense was awarded them, and therefore, they were not bound on that ground; but on the absurd notion that the recoverer was in of the estate-tail, which, in contemplation of law, will ever continue to subsist. 2 Black. Com. 360; Fearne's Essay, 67, 72—(Powell's edition.) But a recovery by tenant in fee-simple did not bar them; for he having the whole estate would be entitled to the whole recompense, and there being no previous estate-tail, there was no room for the notion of its continuing to subsist. This is the foundation of the rule limiting them to take effect within a life in being and twenty-one years after.

In the case before the Court, the bargainee was tenant in fee-simple, and no recovery has or could have been suffered. It is therefore submitted that the heirs of John Jones are clearly entitled to the lands, the profits of which are in dispute in this case.

The second question is, Who are the heirs of John Jones entitled to these lands? At the death of John Jones, his son was his sole heir: but at the death of Harwood Jones the bargainee in 1798, when the reversionary interest of the said John fell into possession, his son and his daughter were equally entitled:* and the question is, Whether the son who was heir at the death of his father John, or the son and daughter who were the heirs at law at the death of Harwood the bargainee, and the falling into possession of the reversionary interest are to take.

(480) Whoever claims a fee-simple by descent from one who was first purchaser of the remainder or reversion expectant on a freehold estate, must make himself

*By the act of 1795, sisters were admitted to inherit lands equally with the brothers, to hold with the brothers as tenants in common.

heir to such purchaser at the time when such remainder or reversion falls into possession (Co. Lit. 116, 7, 146, 15 a; 3 Co. 42; Fearne 449, 534; 2 Will. 29); and although the particular reason given in the case in *Willson*, against the Plaintiff, was, that she was not of the blood of the first purchaser, yet that would not govern the case from Lord *Coke*, as the father and the sister of the whole blood were of the blood of the first purchaser. It must therefore be the general one assigned by *Fearne*, "that she was not heir at the time of the contingency happening, and the estate falling into possession."

In Formedon in Descender, the Court stating the gift to the first donee, expressly avers a descent from him to A, his son and heir, then to B, his son and heir, and then to the defendant, his son and heir. Co Ent. 317, 320, &c. But in Formedon in the Remainder and Reverter, the Court only avers the happening of the contingency on which the lands were to go over or revert; and that on its happening, the lands ought to go over or revert to the defendant, who now claims as cousin and heir of the first purchaser or donor; and only under a *scilicet* shews how he is cousin and heir. Rast. Ent. 375–6; Cok. Ent, 329, 338, 340. What is laid under a *videlicet* is mere form, not traversable by the Defendant; nor is the Plaintiff obliged to prove it, but may support his general allegation of being cousin and heir by proof of any other facts Hob. 105–6. As the accuracy and scrupulous precision of ancient pleading, and the necessity that a party was under of averring every thing material to his claim, are well known, and as the demandant in remainder or reversion only averred that at the time the contingency happened and the lands were to come into possession, he was heir to the first purchaser or donor, these precedents appear to be strong evidence, that he who was heir at the (481) time of the contingency happening and the lands falling into possession, was to take; and not he that was heir at the death of the first purchaser or donor, or those claiming under him. The same doctrine is strongly laid down by Brampton, Chief-Justice, and Berkley, Justice, in *Cro. Car.* 411, and agreed to by Jones and Croke, Justices, although they differed from the others in the determination of that case upon the custom. But Croke reports himself and Jones as having said, "If lands vest in an heir by reason of a contingency, although another heir more near comes

in *esse*, it shall never be divested; and he who will after claim ought to claim from him in whom the estate vested." The two cases which they cite in support of this doctrine, are both stated in *Co.* 65, *a.* and shew that by the term "*vest*" they meant vesting in possession on the happening of the contingency. Indeed, they could mean nothing else, for an interest, while it depends on a contingency, is not a *vested* interest, and is therefore called contingent. So that this doctrine has no bearing on the case now before the Court. Both cases are, however, well explained, and the dictum itself shewn not to be Law, in 1 *Co.* 69 *a*—*Cro. Car.* 87—*Hob.* 3—3 *Co.* 61, *b.*

The interest of the first purchaser of a remainder in fee, or the donor of a reverter in fee, is to him and his heirs forever; and on his death, whatever interest vests in his heir, is to him and his heirs forever. But the cases already cited, shew that this interest, although vesting in the heir of the first purchaser or donor and his heirs, is subject to be divested by any subsequent event which makes them not heirs to the first purchaser or donor *at the time when the reversion falls in.* It is true, that none of these cases shew that the estate may, by a subsequent event, be divested out of an heir of the first purchaser or donor, in whom it has once vested; but only that it shall not descend from such heir to his heirs, which must be owing to the law of descent's never having been changed in England since we have any reports of
(482) cases decided there: and therefore, if the remainder or reversion once vested in a person, as heir of the first purchaser or donor, he continued to be heir to the first purchaser or donor at the falling in of the reversion, if he so long lived; but such heir does not take an interest to himself and another to his heirs; and if the interest which he takes to his *heirs* is liable to be divested, and has been divested by subsequent events, making *his* heirs not heirs to the first purchaser or donor at the time when the reversion or remainder fell into possession, why should not *his* interest be liable to be divested and actually be divested by a subsequent event, (the passing of a public and general law,) making *him* not heir to the donor or first purchaser at the time when the reversion or remainder fell into possession?

It is impossible to ascertain when this rule of Law was first established; but it was probably after that which, in opposition to the principles of both natural and feudal law,

excluded the children of different venters from inheriting from one another the lands of their common ancestor; and one beneficial consequence, if not a cause of it, is the avoiding of some extreme hardships under the latter rule: *ex gratia*, if John Jones had had two sons by different venters, and no other relations whatever, and died, then the son by the first venter had died, and then Harwood Jones, the bargainee, had died, living the son by the second venter; by this rule, the son by the second venter would inherit; whereas, if the reversion had vested in the son by the first venter, that then must have continued in him and his heirs, and could not be divested by any subsequent event making him or his heirs not heirs to the first donor at the time of the reversion falling in, the son by the second venter could not, at Common Law, inherit, but the lands would escheat. In Cunningham *v.* Moody, (1 Ves. 174,) Lord Hardwicke says, in a similar case, "The Court never is sorry to see this happen between brothers and sisters of the half blood by the (483) same father; it both answers the intention and rule of nature." It is also in strict conformity to the great principles of inheritance, it admits all the blood of the first purchaser, and none but the blood of the first purchaser.

It is a common sense in Law, for lands to vest in one *sub modo* only, so as to be divested by a subsequent event, and vested in another. It occurs *ex institutione legis* in every instance where, on the death of a tenant in fee or in tail, his lands descend to his daughter, brother, uncle, &c. and afterwards a son is born or other nearer heir; the after-born issue shall enter upon the sister, brother, uncle, &c. and divest the estate which he or she took by descent. Co. Lit. 11, b.; Com. Dig. Descent. C. 2, *et multis aliis*. So it occurs often *ex provisione hominis:* as where lands are settled or devised to the use of the husband and wife for life, remainder to such one or more of their children as they shall appoint; and in default of such appointment, to all their children as tenants in common: there on the birth of one child, the remainder vests solely in it; but on the birth of a second child, one moiety of the remainder is divested out of the first child, and vested in the second, and so on *toties quoties:* and if the father and mother make an appointment, then the whole remainder is divested out of the children as tenants in common, and vested according to the appointment. Cunningham *v.* Moody, 1 Ves. 174: 4 Term Rep. 30. Thus, if on the death of John

Jones, an interest vested in his son Harwood, one moiety of that interest was liable to be divested, and was actually divested by the act of Assembly of 1795, and each of the Defendants is entitled to a moiety of the lands, and of course to a moiety of the profits.

But it is contended, that on the death of John Jones, no interest whatever descended to or vested in his son Harwood. Wherever the vesting of an estate, either in interest or in possession, depends on a contingency, which, by possibility may never happen, it is called a *possibility;* and the (484) old authorities did not perhaps distinguish between them. But the law for a number of years past, has distinguished and made a wide difference between them. The first, where the vesting in interest depends on a contingency, which, by possibility may never happen, is called a bare or naked possibility, and has no existence until the event happens. It is a mere hope or expectation, such as an heir apparent has during the life of his father, and of course cannot be disposed of. The second, where the vesting *in possession only*, depends on a contingency, which, by possibility may never happen, is called a possibility, coupled with an interest; or there is a present existence in interest, although the taking effect in possession, depends on a future event (1 H. Bl. 537): and it has been decided by degrees, that these last are descendible, releasible, assignable and devisable. 3 Term Rep. 93, 95. It is admitted that John Jones, the donor, had a possibility coupled with an interest; it was descendible to his heirs, and he might have disposed of it from his heirs, either by release, assignment or devise. But on his death his son took no such interest. It was not descendible from him to his heirs. If he had died in the lifetime of his uncle, his father's heirs and not his, would have been entitled at the death of his uncle, as has been shewn already. He could not devise it (3 Lev. 427): nor could he assign it; for devisable and assignable are convertible terms; a devise being only an assignment in contemplation of death. The son of John had not therefore, during the life of his uncle, a possibility coupled with an interest: but only a bare, naked possibility, a mere hope or expectation that he would be heir to his father at the death of his uncle. The Legislature have disappointed this expectation by the act of 1795, declaring his sister should inherit equally with himself; so that these

lands and the profits thereof must be equally divided between them.

No inconvenience even at the Common Law, could (485) have resulted from considering such possibility as in abeyance or suspension, on the death of the donor or first purchaser. The uncle was tenant in fee-simple, constituted a complete feudal tenant, was dispunishable of waste, could pray in aid of no remainderman or reversioner, could even bring or defend a writ of right: and the power of alienation could only be restrained during the period which lapsed between the death of John Jones and his brother Harwood Jones

BY THE COURT—For the reasons given by the counsel in the argument of this case on behalf of Davie and wife, we are of opinion, that they are entitled to a moiety of the rents and profits received by the guardian. Judgment accordingly.

THE WARDENS OF THE POOR OF GRANVILLE COUNTY *v.* WILLIAM M. SNEED.

From Granville.

The act of 1808, ch. 12, sec. 3, declares the appointment of deputy clerk of the county court, to be incompatible with the office of a justice of the peace; and further declares "that, if after the passing of the act, any person holding the office of justice of the peace, shall *accept* the appointment of deputy clerk, his office as a justice of the peace, shall be vacated; and if being deputy clerk *he accept* the office of justice of the peace, his appointment as deputy clerk, shall be vacated: and if any person shall presume to act in any of the said offices, contrary to the true intent and meaning of the act, he shall forfeit and pay the sum of fifty pounds." This act does not extend to the case of a man who was both deputy clerk and justice of the peace *before the* passing of the act; and who subsequently continued to act as a justice of the peace, without resigning his appointment as deputy clerk.

This was an action of debt, brought to recover the penalty of fifty pounds, imposed by the act of 1808, ch. 12, s. 3, (486) which declares, that "the following appointments are declared to be incompatible with the office of a justice of the peace, that is to say: clerk of the court of pleas and quarter ssssions, deputy clerk thereof, deputy sheriff, constable and county trustee; and any person who now holds, or may hereafter accept the office of justice of the peace, and

who shall accept of any of those appointments in the same county, shall thereby vacate his said office; and any person holding either of these appointments, who shall accept the office of justice of the peace in the same county, shall thereby vacate his said appointment; and every person who shall presume to act in any of these offices, contrary to the true intent and meaning of this act, shall forfeit and pay the sum of fifty pounds, to be recovered in any Court having cognizance thereof, in the name of the wardens of the poor for such county, and to be applied by them to the use of the poor." The Defendant had been duly appointed and commissioned as a justice of the peace for Granville county, and had taken the oaths prescribed by law for his qualification, before the passing of this act. He had also been duly appointed, and had qualified as deputy clerk of the court of pleas and quarter sessions for Granville county before the passing of this act; and he continued to act as a justice of the peace in the said county after the act went into operation, without having resigned his appointment as deputy clerk of said Court. It was submitted to the Supreme Court to decide whether the Plaintiffs were entitled to recover.

BY THE COURT—This being a penal act, is to be construed strictly. The case of the Defendant is not within the letter of the act. The offence charged against the Defendant, for which the forfeiture is sought to be recovered, is, "acting as a justice of the peace after the act went into operation, without resigning his appointment as deputy-clerk of the County Court." If subsequently to the passing of the act,
(487) *he had accepted* the appointment of deputy-clerk, his office of justice of the peace would have been thereby vacated: If, being deputy clerk, he had *subsequently* to the passing of the act *accepted* the office of justice of the peace, his appointment as deputy-clerk would thereby have been vacated. This must be construed to be the *true intent and meaning* of the act; and the act declares, that if any person shall presume to act *in any of the said offices*, contrary to the *true intent and meaning* of the act, he shall forfeit fifty pounds. The Defendant's case does not come within either branch of the act. He did not, after the passing thereof, either *accept* the *appointment of deputy-clerk*, or *the office of justice of the peace*. He held both, before that act passed. Let judgment be entered for the Defendant.

(488) JAMES CRITCHER *v.* SAMUEL WALKER.

From Granville.

Circumstances which incline the Court to construe a transaction to be a *conditional sale*, and not a mortgage. Among others, 1st. The money advanced being equal, or nearly so, to the value of the goods conveyed; 2d. A stipulation in the contract of the parties, that he who advances the money and receives the goods, shall hold the goods subject to the claim of him from him whom he receives them, until a particular day, and subject to his loss if they be destroyed by that day; but to hold them free from such claim after the day, and subject to his own loss if they be destroyed or perish after the day.

Critcher being in want of money, applied to Walker, who advanced to him £70, and he thereupon placed in Walker's possession a negro girl, to work for the interest of the money to a particular day, up to which day Critcher was at liberty to pay the money and take the negro back; and if the negro died before that day, Critcher was to bear the loss; if after the day, and the money was not paid by the day, Walker was to bear the loss. £70 was the value of the negro girl at the time Walker received her into possession. Twelve years afterwards, when the negro girl had grown up and had several children, Critcher tendered the money, and demanded the negroes. Walker refused to deliver them, and Critcher filed his bill, praying to be permitted to redeem the negroes, treating the transaction between him and Walker as a mortgage. Bill dismissed: for as £70 was the value of the negro girl, and Walker was to bear the loss, if she died after a particular day, the Court will construe the contract to be a *conditional sale*, and not a mortgage.

In mortgages, the want of a covenant for the repayment of the mortgage money is no bar to a redemption: nor in such case is the mortgage without remedy, although the goods be destroyed, or not of value sufficient to pay the debt. In Equity he may recover the money from the mortgagor: for every mortgage implies a loan, and every loan a debt.

The bill charged, that Complainant, being in want of money, applied to the Defendant, in the year, 1785, to loan to him the sum of £70, Virginia currency, and that the Defendant agreed to loan the money, provided Complainant would place in his possession a negro woman named Mag, as a security for the money, and to work for the interest thereof; that Complainant thereupon received the money, and delivered the negro woman to Defendant, and (489) at the same time executed a bond to the Defendant for the money, and Defendant had the bond still in his possession. The bill then charged, that the negro woman had had five children since she was delivered to the Defendant; that Complainant had in 1797, tendered to Defendant the sum of £70 Virginia currency, and requested Defendant to surrender to him Mag and her increase; that Defendant refused to accept the money, or surrender up the

negroes. The bill prayed that Complainant might be permitted to redeem, &c.

The Defendant in his answer, admitted that he had advanced £70 Virginia currency, to the Complainant, but averred that he took Complainant's bond for the repayment thereof on the 25th December, 1785; and that he took the negro woman Mag into his possession on the following terms, viz, that she was to remain in his possession until the said 25th day of December, at which time Complainant was to be at liberty to take her back, upon paying the money advanced, without interest: but if complainant failed to pay the money by or on that day, she was to become the absolute property of the Defendant. That the bond was given to secure the debt in the event of the negro's death before the 25th December; that it was agreed, if she died before that day, the loss should fall on the Complainant. If she died afterwards, the loss should fall on the Defendant. The Defendant also relied upon the length of time, and insisted that in analogy to the statute of limitations, the Court ought to refuse any aid to the Complainant.

The answer being replied to, sundry issues were made up under the direction of the Court, and submitted to a Jury, who found, 1st. That Defendant had kept possession of the bond for £70, Virginia currency, from the time it was given, and had not offered to return it to the Complainant. 2d. That £70, Virginia currency, was the value of the negro girl Mag, at the time she was delivered to De-
(490) fendant in 1785. 3d. That she was to remain in possession of Defendant, subject to the claim of the Complainant, until the 25th December, in that year, and up to that day Complainant was to pay no interest upon the money advanced to him by Defendant, but the negro's work should be for the interest. 4th. That Complainant was to bear the loss, if the negro died before the 25th December; and the Defendant was to bear the loss, if she died after that day. 5th. That Complainant had not paid the money due on his bond, nor applied to the Defendant to have it surrendered up to him.

The case was sent to this Court upon the bill, answer, replication to the answer, and findings of the Jury.

HALL, Judge, delivered the opinion of the Court:

The allegations of the Complainant's bill exhibit, in

almost all respects, the features of a mortgage; the answer of the Defendant, those of a conditional sale. But as neither are evidence, except against the party from whom they come, we must have recourse to the facts as found by the Jury. It is of importance to keep in view, that one of these facts is, that £70 Virginia currency, was the value of the negro at the time she went into the possession of the Defendant; a circumstance which does not happen in mortgages, but is often found in conditional sales. A circumstance in which the transaction resembles a mortgage, is this, that if the negro died before the 25th December, 1785, the Complainant was to bear the loss; on which account he gave his bond for the money. The Defendant, in his answer states that the bond was given to secure the debt, if the negro died before that day. Although the Jury do not find expressly that the bond was given for that and no other purpose, yet they find that which is tantamount to it: for they find that the Defendant was to bear the loss in case the negro died after the 25th December, 1785; which finding seems to distinguish the case from a mortgage: for if the negro had died after that day, and suit had been brought upon
(491) the bond for the money, a Court of Equity would have enjoined the proceedings, if this fact had been made to appear; the consequence of which would have been, that the Defendant must have borne the loss. This is not like the case of a mortgage reported in 2 *Atk.* 496, (and the same principle is to be found in many other cases,) "that in mortgages the want of a covenant for the repayment of the mortgage money is no bar to a redemption." For although there is no bond or covenant for the payment of the mortgage money, yet the mortgagee is not without remedy. See the case of King *v.* King, 3 P. Wms. 388, and Lord Hardwicke's decree thereon, cited by Lord Talbot, which was the case of a ship mortgaged and then taken at sea, and there was no covenant for the payment of the money. Although the ship could not be said properly to be in the nature of a pawn, since the mortgagor had gone in her to sea, yet the executors of the mortgagor were decreed to pay the money for which the ship was mortgaged. For it is said in these cases, that every mortgage implies a loan, and every loan a debt. 1 P. Wms. 271, 291. So in case the mortgagor be evicted, or the property mortgaged be not of value sufficient to pay the debt, as agreed by the counsel in the case of How-

ell *v.* Price, Id., the mortgagee might in Equity recover the money against the mortgagor. But in this case, if the negro woman died, it was the loss of the Defendant; and with respect to him, it cannot be said, as in case of mortgages, that there is a debt due. As the negro has lived and become valuable by her increase, the Defendant is entitled to the benefit arising therefrom. Agreeably to the Complainant's view of the case, the Defendant might lose, but could not gain. As Defendant has run the risk of a total loss, he shall have the gain that has been made. As to the length of time, it is only necessary to remark, that under the particular circumstances of this case, it strongly fortifies the Defendant's situation. Let the bill be dismissed.

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(492)

CORNELIUS WINGATE *v.* The Executors of GIBSON *et al.*

From Fayetteville.

A. having recovered a judgment against B. sued out a *fi. fa.* and before the return of it he died. *After* his death, he having no representative another *fi. fa.* was sued out in his name. This *fi. fa.* set aside as having issued erroneously.

At April term, 1805, of Fayetteville Superior Court, Cornelius Wingate recovered a judgment for one thousand pounds, against John M'Alister and the executors of William Gibson. A *fieri facias* was sued out, returnable to October term, 1805, and Defendants having filed a bill in Equity for that purpose, obtained an injunction as to $700 of the judgment. Another *fieri facias* was issued from October term, 1806, returnable to April term, 1807, upon which nothing was done. At April term, 1807, there was a suit pending in the same Court at the instance of the executors of William Gibson *v.* Cornelius Wingate, and at that term, the death of Wingate was suggested in that suit. At October term, 1807, another *fieri facias* was sued out upon the judgment aforesaid, in the name of Cornelius Wingate, returnable to April term, 1808; and at this term a motion was made to set this *fi. fa.* aside, for having issued irregularly, the sheriff having done nothing upon either of the *fi. fa's.* issued in the lifetime of Wingate; he having died, and his death being suggested of record before the issuing of the last *fi. fa.* and he

having no representative before the Court. The motion being sent to this Court,

BY THE COURT—Let this motion be allowed, and the *fi. fa.* be set aside.

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(493)

Den on Demise of JOHN WILSAY AND WIFE *v.* MALACHI SAWYER AND WIFE.

From Camden.

A. being seised of lands, dies intestate in 1802, leaving a brother and sister, also a widow and two children; each of the children dies intestate and without issue. The lands do not go to the mother, but to the uncle and aunt of the father.

This was a question of descent. John Watkins being seised of the land, died intestate in the year 1802, leaving a widow and two children, John and Mary. Mary died intestate and without issue, and shortly afterwards John died intestate and without issue, leaving his mother (wife of the Defendant Sawyer) him surviving. John Watkins the elder, left a brother named Miles, and a sister named Anne, who is the wife of John Wilsay, the lessor of the Plaintiff. Miles conveyed to Wilsay, and Sawyer and wife having gotten possession of the lands, Wilsay brought this ejectment. The question was, Whether upon the death of John Watkins the younger, intestate and without issue, the lands descended to his uncle and aunt, the brother and sister of his father, or to his mother?

BY THE COURT—John Watkins the younger, took the lands by descent from his father. In such case the mother is not entitled to the lands upon his death, either under the 7th section of the act of 1784, ch. 22, or the 2d section of the act of 1787, ch. 19. The lessors of the Plaintiff are entitled to the land. Let judgment be entered accordingly.

(494)

Den on Demise of LINDSEY AND WIFE *v.* JOHN BURFOOT.

From Camden.

Testator devised his lands "to be divided between his daughters, Amey and Jaca; and if either of them died before they came of age *or* married, the share of the one so dying to vest in and belong to the other." Jaca married and died before she came of age, in 1792. She had a brother, who died in her life-time, leaving children, who were her heirs at law under the act of 1784, c. 22, s. 3. The lands devised to Jaca, vested absolutely in her upon her marriage, and upon her death descended to her heirs at law.

The Court will not construe the word *or* copulatively, so as to render the happening of both events, viz: Jaca's marriage and her death under age, to be necessary to the absolute vesting of the estate in her, unless it be to carry into effect the intent of the testator; and where no intent appears rendering such a construction necessary, the word *or* shall be construed disjunctively.

The question in this case arose upon the will of Robert Burfoot, who being seised of the lands mentioned in the declaration, devised them with certain personal estates "to be divided between his daughters, Amey and Jaca; and if either of them died *before they became of age or married*, the share of the one so dying should vest in and belong to the other." Jaca married and died before she came of age, in 1792. She had one brother, who died in her life-time, leaving children, and these children were her heirs at law under the act of 1784, c. 22, s. 3. Her sister Amey married Lindsey, the lessor of the Plaintiff. And the question was, Whether Amey was entitled to the lands under the limitations of the will? Or whether they descended to the heirs at law of Jaca, under whom the Defendant claimed?

BY THE COURT—It is contended for the lessors of the Plaintiff, that both events, to-wit, the marriage of Jaca and her death under age, must happen, before the lands vested absolutely in her and defeated the limitation to Amey; and that the word *or* ought to be construed copulatively
(495) as *and*. If it were necessary to resort to this construction to carry into effect the general intent of the testator, the Court would do it: but there is no good reason in this case for giving to the word *or* any other than its ordinary meaning; there is nothing from which the Court can infer, that the testator did not intend that the estate should vest absolutely in Jaca, upon the happening of either event; and one of them having happened, we are of opinion, the

lands vested absolutely in her, and descended to her heirs at law. Judgment for the Defendant.

ANDREW GIBSON *v.* JESSE LYNCH.

From Guilford.

A. having recovered a judgment against B. in the County Court, B. prayed an appeal to the Superior Court, which was granted, upon his entering into bond with *one* security only. On motion of A. in the Superior Court, the appeal was dismissed; for,

The act of 1777, c. 2, declares that "before either Plaintiff or Defendant shall obtain an appeal to the Superior Court, he shall enter into bond with *two* sufficient securities." Giving bond with *two* sufficient securities, is a condition precedent, which must be complied with before the County Court have the power to grant an appeal.

And the motion to dismiss may be made at any time. Therefore, B. having filed with the Clerk of the Superior Court a transcript of the record, at April term, 1807, and the case remained on the docket until April term, 1810, during which time, sundry orders were made in it. A motion to dismiss, was allowed.

This was a motion to dismiss an appeal, upon the ground that the appeal bond had been signed by one security only. Judgment was rendered in the County Court at February term, 1807, and a transcript of the record having been filed with the Clerk of the Superior Court, sundry orders were made in that Court, and the case remained on the (496) docket until April term, 1810, when a motion was made to dismiss the appeal. The motion was sent to this Court, and

LOCKE, Judge, delivered the opinion of the Court:

It has already been decided by this Court, that an appeal cannot be sustained, where the appellant has failed to give two securities. This question is again brought forward, either for the purpose of having that decision revised, or under a belief that this case is attended with some peculiar circumstances which did not attend the case heretofore decided. The only peculiar circumstance attending this case is, that the case was permitted to remain upon the docket of the Superior Court from April term, 1807, to April term, 1810, during which time, sundry orders were made in it, before any motion was made to dismiss. But this circumstance cannot sustain the appeal. The act of 1777, c. 2, declares "that if

any person or persons, either Plaintiff or Defendant, shall be dissatisfied with the judgment, sentence, or decree of the County Court, he may pray an appeal to the Superior Court of Law: but before obtaining the same, shall enter into bond with *two sufficient securities* for prosecuting the same with effect, and for performing the judgment, sentence and decree, which the Superior Court shall pass thereon." The mode of having a cause revived in the Superior Court, by way of appeal, is given by the act of Assembly, and not by the Common Law; and the Legislature who gave the right of having a cause tried *de novo* in the Superior Court upon an appeal, have prescribed the terms upon which this right might be had. If they had not prescribed the terms, they would have given to the Superior Courts the power of modelling the practice, according to the principles of justice, and the convenience of parties. But they have, in clear and unequivocal language, declared, that before either Plaintiff or Defendant shall have this right, he shall enter into (497) bond with two sufficient securities. What, then, is the power given to the County Court in granting appeals? Simply to decide whether the two securities offered be good and sufficient, not whether the party praying the appeal shall be entitled to it on his giving one sufficient security. The object of the act was to secure the appellee in any judgment he might obtain in the Superior Court; and although it is said, this object will be attained equally as well where one sufficient security is given, the Legislature thought there would be more certainty in having this object attained, by having two sufficient securities given, than one. They presumed that the party prevailing in the County Court had justice on his side, and if the other party were dissatisfied, he should not appeal until he secured his adversary in such judgment as he might recover in the Superior Court. They have pointed out how that security shall be given, and have made the giving of it a condition precedent to obtaining the appeal. Until this condition be complied with, the County Court have no power to grant an appeal.

It is said, the County Court having granted an appeal in this case, and being a Court of competent jurisdiction, this Court will presume that it has acted rightly. The answer to this is, that the act of Assembly makes the appeal bond a part of the record to be certified to the Superior Court, and although the presumption is, that the County Court has

acted rightly, yet this presumption lasts only until the contrary appears; and that appears from the record certified to the Superior Court. And as it is as much the fault of one party as of the other to permit the case to remain so long on the docket of the Superior Court, a motion to dismiss, for the reasons offered in this case, is always in order. The act of Assembly is imperative, and the motion to dismiss the appeal must be allowed. Appeal dismissed.

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(498)

BARTLETT TYLER *v.* The Administrator of THOMAS PERSON, Deceased.

From Warren.

Under the act of 1787, ch. 19, the Courts have the power to make rules for the Plaintiff to give further security from time to time, for the costs; and in case of a failure to comply with these rules, to dismiss his suit.

And the Court seemed to have had this power, before that act passed.

This was a motion that the Plaintiff be laid under a rule to give other and further security for the prosecution of the suit, or that the suit be dismissed. The Plaintiff had given bond with security, for the prosecution of the suit, at the time the writ was sued out, agreeably to the directions of the act of 1787, ch. 19; but the security had removed out of the State since that time. The motion was opposed upon the grounds, that the Plaintiff having given security when he sued out his writ, had done all that the act of Assembly required of him, and that the Court could not order the suit to be dismissed except for some defect or irregularity in the proceedings. The motion was sent to this Court; and

HALL, *Judge*, delivered the opinion of the Court:

We find that in many instances in the English Courts, the Judges have directed that security should be given for costs: as in the case of an ejectment brought on the demise of an infant; in the case of the death of the lessor of the Plaintiff in that action, or where the lessor resided without the kingdom; so, also, where an action for the mesne profits was brought in the name of the nominal Plaintiff, who had recovered in an action of ejectment. Sayer's Law of Costs, 152.

The Courts have done this without the aid of any statute passed for that purpose. It is true, that in other cases they have refused to make such orders; as where the Plain-
(499) tiff, a merchant, resided at Dunkirk, (1 Wills. 266,) also where the Plaintiff was a Swede. Strange 1206. But what is the reason assigned? "That such a rule would affect trade, in shutting up our Courts from foreigners, who could not, perhaps, find security in a foreign country." That the Courts have the power to require such security, has not been doubted; policy has sometimes forbidden the exercise of it.

The act of 1787, ch. 19, recites in its preamble, that "Whereas transient persons and others having no property real or personal in this State, obtain writs and enter into litigious law-suits, where they have no allegations sufficient to support a suit, or property to disburse the charges thereof in case of failure, much to the injury of the good citizens thereof, for remedy," &c. The enacting clause then directs, "That every clerk, before issuing any writ, or other leading process, shall take sufficient security of the person so applying, conditioned that he will prosecute such suit, or in case of failure, pay to the Defendant all costs," &c. Our Legislature and the English Courts have not been influenced by the same policy. Our Legislature have decided the question, and not left it to the Courts to decide. Independently, therefore, of any right which the Courts of this State might exercise in directing security to be given for the costs under particular circumstances, in case an act had not been passed upon the subject, the true spirit and meaning of the act is, not only that security be given, but if the security remove or become insolvent, further security may be required. Let the motion be allowed.

(500)

JAMES OATS, Trustee of the County of Sampson, *v.* JESSE DARDEN, late Sheriff of said County.

From Sampson.

The summary remedy against delinquent Sheriffs, given by the act of 1808, ch. 21, applies as well to cases where the delinquent is out of office, as where he is not; and also applies to arrearages due by the delinquent previous to the passing of the act.

The act is a beneficial one, and is to be liberally construed.

This was a motion made under the act of 1808, ch. 21, for judgment against the Defendant, for arrearages due from him as Sheriff for the year 1807 and 1808. Two questions were made: 1st. Whether the summary remedy given by that act applied to arrearages due before the passing of the act? and, 2d. Whether this remedy could be enforced against a man whose Sheriffalty had expired.

HALL, Judge, delivered the opinion of the Court:

The policy of the Legislature in giving a summary remedy against sheriffs, is obvious. They considered that there was no necessity of going through all the forms of an ordinary suit, against a man who had in his hands public money. Where an individual sues another, delay is frequently necessary to prepare for trial; but this is not the case with two persons, one acting as county trustee, the other as sheriff. As to the objection in this case, that the Defendant is out of office, there is no good reason to support it. The question is not, whether the Defendant now be sheriff, but was he sheriff at the time the monies now claimed of him came into his hands? He is in no worse situation, nor is the county trustee in any better, by his being out of office. This is not like the cases where remedies are given in a summary way, by Courts against their officers as such. There they proceed against them as *their* officers, forming part of the Court, but moving in an inferior sphere. On this account it is,
(501) that the Judges, who have the control over them, compel them in a summary way, to do their duty. This is a power inherent in all Courts. But the moment a man ceases to be an officer of a Court, he falls into the common mass of citizens, and is no longer amenable to it as an officer. The present Defendant is not called upon by such a power. The law of the land has pointed out the mode of proceeding now in question, against him, as well as against

all public delinquents. It is a matter of no consequence whether he be out of office or not.

As to the other objection, that the act which authorises this proceeding, passed in the year 1808, and that the Defendant cannot be proceeded against under it for public monies which came into his hands previous thereto, and that the remedy which the county trustee then had, must be resorted to: it may be answered, that when an act of Assembly takes away from a citizen a vested right, its constitutionality may be enquired into: but when it alters the remedy or mode of proceeding as to rights previously vested, it certainly, in that respect, runs in a constitutional channel. The act of 1808, ch. 21, declares, "that the county trustees shall annually call upon the sheriffs of their respective counties, for the payment of all monies that may be in their hands due to the trustee, &c.; and if any sheriff shall fail to account, then, &c. to move for judgment against such sheriff, &c. ten days notice being previously given, &c" This act does not alter the rights of the sheriff; it only alters the mode of proceeding against him. Surely the Legislature have the right to do this. But it is said, the act of 1808, created new penalties. If it did, the answer is, they are not sought to be enforced in this case. But in truth, no new penalties are created: the act of 1795, which the act of 1808, was intended to amend, pronounced the same penalties against delinquent sheriffs. These acts are beneficial, and should be liberally construed. The motion for judgment against the Defendant, must be allowed.

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(502)

SAMUEL WELLBORN *v.* NATH'L GORDON'S Administrator, &c.

From Wilkes.

Wherever an administrator establishes the plea of "fully administered," he is entitled to judgment of execution for his costs, immediately against the Plaintiff.

In this case the Plaintiff established his claim against the estate of the intestate, and obtained a verdict for the same; but the Defendant supported the plea of "*plene administravit;*" upon which the counsel for the Defendant moved for

judgment of execution against the Plaintiff for his costs. And three questions were made, 1st, Whether the Defendant was entitled to costs. 2dly, If so, who was to pay them, the Plaintiff or the heirs at law of the intestate? 3d, Was he to wait for his costs until final judgment against the heirs at law, upon a *scire facias* to be sued out against them by the Plaintiff to subject the real estate descended to the payment of his debt, or was he entitled to an execution immediately against the Plaintiff for his costs.

BY THE COURT—The administrator having established the plea of "*plene administravit*," is entitled to judgment for his costs. There is no person in the Court against whom he can pray for judgment, but the Plaintiff. He and the Plaintiff are the parties litigant upon the record. If the Plaintiff should proceed by *scire facias* against the heirs at law to subject the real estate to the payment of his debt, the administrator will be no party to that proceeding, unless the heirs should wish to have a collateral issue made up between themselves and the Defendant, to try whether the Defendant has fully administered. If the finding of the Jury upon such collateral issue should be in favour of the Defendant, he could have judgment against the heirs only for the costs of such collateral issue. If the Plaintiff failed to sue out a *scire facias*, the heirs would not be before the Court,
(503) and no judgment could be prayed against them. And in all cases where there was no real estate in the hands of the heirs, the administrator would lose his costs if he could not look to the creditor for them. Wherever the administrator establishes the plea of "fully administered," he is entitled to judgment and execution for his costs against the Plaintiff immediately. Let the motion be allowed.

INDEX TO THE FIRST VOLUME.

ABATEMENT.

1. The defendant pleaded in abatement "that the plaintiff resided in the State of Georgia, and that he the defendant resided in the district of Newbern and ought not to be compelled to answer the suit in Fayetteville district court. The Plaintiff replied that one A. B. had the beneficial interest in the suit, and that he resided in Fayetteville district." The defendant demurred to the replication. Demurrer overruled. *Page* 95.
2. On the abatement of a suit by the death of the plaintiff, execution for the costs ought not to be issued, until a *scire facias* has issued to the representatives of the plaintiff. 113.
3. A. instituted suit against B. and pending the suit, she (A.) intermarried with C, between January and July Terms, 1805, of the Court. At January Term, 1806, the Defendant pleaded this intermarriage in abatement, and that C. had not been made a party Plaintiff. To this plea, the plaintiff demurred. The demurrer overruled and plea sustained. 161.
4. Defects in warrants must be pleaded in abatement; they cannot be taken advantage of after verdict upon motion to arrest. 252.
5. An order entered of record for a *scire facias* to issue to make the representative of a deceased Defendant a party to a suit, will prevent an abatement of the suit; for the order being made, it is the business of the Clerk to issue the *scire facias*, and if he fail to do it, the Plaintiff shall not be prejudiced by his neglect. 441.

ACCESSORIES.

See INDICTMENT.

ADMINISTRATORS AND EXECUTORS.

1. Administrators and executors are not liable for costs incurred in a suit brought by their intestate or testator, and prosecuted by them after his death. Where they sue in *Auter Droit*, they are not liable for costs *de bonis propriis:* they are liable where they sue *in their own right*, although they name themselves administrators or executors. 102.
2. Where they sue in *Auter Droit* and fail, having no assets, costs are lost, unless they give bond and security for the costs, and then the security is liable. 103.
3. An executor appeals from the judgment of the County Court and enters into bond with security. The bond is binding on him and his securities; and on a *scire facias* against the securities, founded on the appeal bond and on a judgment in the Superior Court against the Executor, judgment given in favor of the Plaintiff. 103.

Whether executors and administrators, when appellants, are bound to enter into bond with security? Whether bound or not, if they enter into bond and give security, such bond is obligatory upon the parties. 113.

4. An executor or administrator may assign the securities of his testator or intestate, without naming himself executor or administrator. 133.

5. A pays to B his co-executor, a sum of money belonging to their testator's estate. A and B die. C, the administrator *de bonis non* of the testator, brings suit against the representatives of A, who survived B, for an account of testator's estate; the representatives of B who received the money must be made parties. 160.

6. A bequeathed negroes and other personal property to his wife during her life, and after her death to be sold and equally divided among his children. After her death, B converts the property to his own use; the executors of A can bring trover for this conversion. 189.

In this case, the assent of the executors enured only to the tenant for life; for before the remainder could vest in the children, a sale must take place. The executors are trustees for the purposes of this sale and of making distribution amongst the children. 189.

7. Act of 1715, ch. 48, barring the claims of creditors against the estates of deceased debtors.

See LIMITATION, STATUTE OF.

8. Proceedings to repeal letters of administration, must be commenced in the Court in which the letters were granted. The Superior Courts can exercise only appellate jurisdiction in such case. 224.

9. Judgment *quando acciderint* was rendered against an administrator for £1835 4*s*. 2*d*, to be discharged on the payment of £917 12*s*. 1*d*. Plaintiff sued out a *scire facias* suggesting assets and reciting a judgment for £917 12*s*. 1*d*; but not reciting it as a judgment *quando*, &c. *Nul tiel record* and *no assets* were pleaded to the *sci. fa.* The Court sustained the plea of *nul tiel record*, and gave judgment for the Defendant. Plaintiff moved to set this judgment aside, and for leave to amend his writ of *sci. fa.* The judgment was set aside, and leave given to amend on payment of costs. 412.

See WILLS, 6.

10. The distributees of an intestate's estate may bring suit for their distributive shares against the securities of an administrator, upon the administration bond, without any previous proceeding against the administrator, although he has made no settlement of his administration with the Court, nor filed an account current. 437.

11. Whenever an administrator establishes the plea "fully administered," he is entitled to judgment of execution for his costs, immediately against the Plaintiff. 502.

AGREEMENTS.

An agreement made for a valuable consideration, to deliver to the Plaintiff the first female colt, which a certain mare owned by the Defendant might produce, vests a property in the colt when produced, and the Plaintiff may maintain trover for the colt. 389.

ASSUMPSIT.

1. A witness summoned in a suit failed to attend; he was called out, his forfeiture recorded, and judgment *nisi* entered against him. The party at whose instance he was summoned promised

that if he would attend at the next term and give his testimony, the forfeiture should not be enforced against him. He did attend, but the forfeiture was enforced. He then brought suit to recover damages for breach of the promise. He cannot recover because the promise is without consideration, as it was only to induce the plaintiff to do that which it was his duty to do, without reward, except such as is allowed to witnesses for their attendance. 181.

2. Assumpsit will not lie to recover money promised for doing that, which it was the party's duty to do without reward. *Id*

3. A. conveyed to B. a tract of land, containing 221 acres, more or less. Some years afterwards it was mutually agreed to have the land surveyed, and if it were found to contain more than 221 acres, the Defendant should pay the Plaintiff ten dollars per acre for the excess: if it fell short, Plaintiff to refund to Defendant at the same rate. Here are mutual promises, and one is a good consideration to support the other. 287.

ARBITRAMENT AND AWARD.

A suit pending in Chancery is "by consent of parties" referred to five persons, whose report is to be binding between the parties. The referees make a report, and exceptions are filed to it, charging errors and mistakes in liquidating the accounts. The suit then abates by the death of the Complainant. An action on the case was brought to recover the sum reported by the referee to be due. The record of this suit, and the proceedings therein, are not evidence of the debt. The reference being matter of record, the award is not binding until confirmed by the Court. 295.

ATTACHMENT.

1. Money paid into the office upon an execution cannot be attached in the hands of the clerk, at the instance of a creditor of the Plaintiff in execution. 47.

2. A person summoned as a garnishee, may avail himself of any defence which he could make, were he sued by his creditor. A. summoned as a garnishee in a suit between B. and C., declared that he had given his bond to C. for £870; that the debt really due at the time was only £801 15s, and that the bond was given upon an usurious consideration, and therefore void. B. urged A. to make some contract with C. for taking up this bond, assuring him that he might have confidence in C's integrity, and that if he would make such contract, C. would certainly pay to him B., the debt which he owed to him; and A. believed from B's representations, that if he made this contract, he would not be called upon by B. as a garnishee. A. agreed by a day certain to take up his bond and make payment to C., upon his deducting 12½ per cent. from the amount thereof. After this contract was made, but before the day of payment agreed on, B. sued out an attachment against C., and A. was summoned as garnishee. Notwithstanding this summons, A. complied with his contract with C. and paid the money on the day. On this garnishment, no judgment of condemnation will be entered, and the garnishee shall be discharged. 468.

APPEALS.

1. The Judgment of the County Court not being lessened in the Superior Court bears ten per cent. interest up to the time of rendering judgment in the Superior Court. 131

2. An appeal bond cannot be legally executed after the rise of the county court, nor will the appeal be sustained unless the bond is executed in the County Court. The Superior Court cannot take a bond to sustain an appeal. 178.
3. The State is not entitled to an appeal in a criminal prosecution. 257.
4. Appellant bound to give two securities, and one only being given, appeal dismissed. 281.
5. A. sued B. in the County Court, and recovered a judgment, from which B. appealed to the Superior Court, and gave bond, with C. and D. his securities, for the appeal. In the Superior Court A. was nonsuited; and at the same term, the nonsuit was set aside by consent of B, who at the next term confessed judgment; and at the same term, judgment was entered up against the securities for the appeal. Execution issued, and the securities moved to set aside the execution as to them, because B. had set aside the nonsuit without their consent. Motion disallowed; for the securities have no control over the proceedings between the Plaintiff and Defendant, and are bound by all the rightful acts of the Defendant in the course of those proceedings. 408.

BARON AND FEME.

A gave a negro man to his niece B, and agreed to keep the slave at his own expense during his life. Before A's death, B. intermarried with C, who, after A's death, brought an action of detinue for the slave in his own name. The possession of the slave having vested in B. by the gift, and A. having held the slave during his life for the use of B, C. can maintain the action in his own name. 41.

BAIL.

1. Pending a suit, the attorney at law for the plaintiff, gave to the bail of the defendant a paper writing, in which "he agreed that the plaintiff should release and discharge the bail." This is a discharge of the bail. 146.
2. Surrender of the principal by his bail at any time before final judgment upon the *scire facias*, discharges the bail from the costs of the *scire facias*. 188.

BANKRUPT.

1. Under the bankrupt law of the United States the arrest and imprisonment of the debtor are both necessary to constitute the act of bankruptcy, which is not complete, until the time of imprisonment prescribed by law be completed. 149.
2. The court has no authority to establish any other act as an act of bankruptcy than the one on which the commission issued. *Id.*

BASTARDY.

Under the act of 1741, ch. 14, sec. 10, a *married* woman can upon oath accuse a man of being the father of a child begotten of her body previous to her marriage; and the man so accused shall be adjudged the reputed father, and stand charged with the maintenance of such child, as the County Court shall direct. 319.

CARRIER.

1. A being the owner of a vessel lately repaired and put in complete order as was supposed, took on board for freight 270 bushels of corn. The rudder was broken by the sea, the vessel

wrecked and the corn lost. The rudder presented an external appearance of soundness, but was internally rotten, and that fact not known to A. He is liable for the loss of the corn. 173.

A carrier is liable for all losses except such as happen by the act of God or the enemies of the State: and this, though the charge of negligence stated in the declaration be expressly negatived. *Id.*

The principle of this liability is, the public employment which carriers exercise, so that persons induced to confide in them in the course of business may receive all possible security. *Id.*

2. Freighters for hire upon navigable rivers are to be considered as common carriers, and subject to their liabilities. 417.
3. The words of a bill of lading, "dangers of the river only excepted," signify the natural accidents incident to that navigation; not such as might be avoided by the exercise of that discretion and foresight which are expected from persons in such employment. *Id.*

CAVEAT.

Upon the trial of a caveat the only question is, who has the best equitable right to procure a grant for the lands. 115.

CERTIORARI.

See PRACTICE.

1. Affidavits may be read to support the affidavit on which the writ of certiorari was granted as well as to contradict that of the defendant to the writ, and depositions taken in a suit then pending between the same parties may be read upon a motion to dismiss the certiorari. 184.
2. The Plaintiff in a writ of certiorari, is entitled to file affidavits, after those of the Defendant have been filed, either to confirm those upon which the writ was obtained, or to disprove those filed by the Defendant; and he is entitled to a continuance of the cause, to procure such affidavits, if he make it appear to the satisfaction of the Court, that he cannot procure them at the term at which the Defendant's affidavits are filed. 438.

CHOSE IN ACTION.

A deed for lands in the actual adverse possession of another person is totally void. 114.

CLERGY—BENEFIT OF.

No reason exists at this day why females shall not be entitled to the benefit of clergy as well as males. 147.

CORPORATIONS.

See GENERAL ASSEMBLY.

COSTS—SECURITY FOR—RULES FOR.

1. The sum levied upon an execution being insufficient to discharge the plaintiff's judgment, must be applied solely to his use; and the costs of the defendant's witnesses are not to be paid out of the sum thus levied. 140.
2. The solicitor for the State is entitled to a fee in case of a *scire facias* against a delinquent juror, in all cases were costs are given against such juror. 287.

See EQUITY.

See WILLS, 6.

3. Under the act of 1787, ch. 19, the Courts have the power to make rules for the Plaintiff to give further security from time to time, for the costs; and in case of failure to comply with these rules, to dismiss his suit. 498.
4. Wherever an administrator establishes the plea of "fully administered," he is entitled to judgment of execution for his costs, immediately against the Plaintiff. 502.

COVENANT.

1. In a deed of bargain and sale, the words "grant, bargain, sell, &c." do not imply a warranty of title: nor do the words of a deed describing the length of lines and boundaries, &c. and concluding with the words "containing so many acres," import a warranty of quantity. 343.
2. The action of covenant will lie upon the words of a deed "will warrant and defend the premises to A. B. and his heirs forever." And this from necessity, as otherwise a vendee would be without a remedy in many cases: for the writ of *warrantia chartæ* is not in use in this State, nor are real actions, in which voucher is used. 343
3. Plea, "that the Plaintiff before the commencement of the action, had sold and conveyed to another in fee, the lands mentioned in the deed," overruled, and demurrer to said plea sustained. *Id.*
4. See the same points ruled in.

CREDITOR AND DEBTOR.

1. The whole estate of the debtor being liable to the creditor, if owing to the removal of one or more of the legatees from the State, or any other cause, the estate of the testator in his or their hands cannot be reached by the creditor here, the other legatees within the reach of the process of the court are liable to the creditor for his whole debt, if their legacies amount to so much; and if one legatee pay more of the testator's debts than another, it is a question of contribution between him and the other legatees. 177.
2. The creditor is not liable for the maintenance of his debtor in jail upon a *ca. sa.* unless he discharge the debtor, and the debtor be unable to pay for such maintenance. 180.
3. Previous to the act of 1800, ch. 8, a debtor imprisoned for debt, was entitled to the benefit of the act for the relief of insolvent debtors, by remaining within the prison bounds (bond having been given for the keeping thereof) for the space of twenty days. 394.
4. A debtor who is ready to pay his debt when it becomes due, is excused from paying interest thereon, if the creditor conceals his place of residence and the debtor knows not where to apply to make payment. 398.

DEBT, ACTION OF.

Debt lies by the payee against the maker of a promissory note, expressed to be given for "value received." 283.

DEEDS, CONSTRUCTION OF.

1. A deed for lands in the actual adverse possession of another person, is totally void. 114.
2. Plaintiff having lost the bond declared on, after an appeal from the judgment of the County Court, is permitted to prove the

contents thereof upon the trial in the Superior Court, and to recover judgment without amending his declaration. 131.
See POSSESSION.

3. Deeds executed in England, for lands in this State, were proved before the Lord Mayor of the city of London, and the probate thereof certified under the seal of the Mayoralty. They were then transmitted to this State, and arrived in the year 1771, but not registered within twelve months thereafter. They cannot be read in evidence under the act of 1715, ch. 38, as that act requires them to be registered within twelve months *after their arrival.* But the act of 1779, ch. 7, having declared, "that all deeds, &c. not already registered, acknowledged, or proved, shall and may within two years after the passing of this act, be acknowledged by the grantor, &c. or proved by one or more of the subscribing witnesses, and tendered to the registers of the counties where such lands lie, and shall be as good and valid, &c. as if they had been acknowledged or proved and registered agreeably to the directions of any act of Assembly theretofore made," and the deeds *having been registered* within two years from the passing of the act, shall be received in evidence. And a *further probate* of the deeds is not necessary, under this act, to entitle them to registration, they having been legally proved before. 194.
4. The words in a deed of trust, "to pay, satisfy and detain to themselves the sum of £500, together with all costs which shall arise against them for their being security for A, for several different sums of money, also being common and special bail in several suits," do not extend to securityships entered into subsequent to the execution of the deed; and parol evidence is not admissible to prove that the parties intended the deed to extend to subsequent securityships. 228.

DESCENT.

A. being seized of lands, dies intestate in 1802, leaving a brother and sister, also a widow and two children; each of the children dies intestate and without issue. The lands do not go to the mother, but to the uncle and aunt of the father. 493.

DEVISE.

1. A. devised to B. her son, two tracts of land, "to him and his heirs forever." She then appointed C. her executor; and gave him authority and power "to take upon himself the sole and whole management *and disposal* of the rents and profits of the said lands, *absolutely* and *exclusively,* inasmuch as he may manage and *dispose* of the rents and profits, of whatever kind soever, *without the restraint or constraint* of any person or persons whatever, until B. should arrive at the age of twenty-one years." The rents and profits do not belong to the executor: he has a mere naked authority to manage and dispose of the profits, but to do so for the benefit of the devisee. 36.
2. A. bequeathed a negro and horse to B, and declared "that if B. should depart this life *without heir lawfully begotten of her body,* the negro and horse should belong to C. The limitation to C. is too remote. 42.
3. A. bequeathed to his son Thomas during his natural life, a negro girl; and after his decease, he gave the said negro and her increase, "to his grandson Francis, to him and his heirs forever; and *in default of such issue,* the said negro and her increase to be equally divided amongst his brothers and sisters *then living.*" The limitation over to the brothers and sisters of Francis is

valid, and the words "*in default of such issue*," means the failure of issue at the death of Francis. The word "*then*" is here used as an adverb of time, and points to the default of issue at the death of Francis.

4. Rules of construction. 1st. Such a construction ought to be put upon the words of a will, as upon a fair consideration of the whole context, it is evident the testator intended they should receive, unless some rule of law be thereby violated. 2d. Where personal estate is limited after a dying *without issue*, those words do not *necessarily* import a general failure of issue, although the first devise may be of an express estate-tail. Nor in the case of an estate-tail by implication, do they necessarily signify a dying without issue living at the death of the first devisee. If, however, the construction entirely depend on those words, the limitation in both cases is too remote: but in one case as well as the other, the words may be confined to a dying without issue then living, if there be anything in the will from which such an intention can be inferred. 3d. The inclination of the Court should be in favor of such a construction as will support the limitation over, if it can be done; and they should lay hold of any opportunity of referring such words to the want of issue at the time of the death. 51.
5. Whether the Court will look to the *subject matter* of the devise as a circumstance from which the intention may be inferred. See note in page 42.
6. A devises his estate to his "daughter B. and *if B. die without having heirs, then and in that case*, to the nephews and nieces of A." The limitation over to the nephews and nieces is too remote. 143.
7. A bequeaths personal property to his five daughters, naming them, "to them and their disposal." Three of the daughters die in the lifetime of the testator. The shares of these three daughters are to be distributed among the next of kin of the testator, and do not survive to the other two daughters. 190.
8. Testator directs his debts to be paid out of his personal estate; charges his real estate with the maintenance of his wife; gives £1,000 to an only daughter, and after giving other pecuniary legacies, he gives the remainder of his estate to his three sisters. The personal estate is exhausted in the payment of debts; and held, that the legacy of £1,000 to the daughter is a charge upon the real estate. 192.
9. A. devised all his cash on hand, certificates, stock in trade, &c., also all his estate real, personal, or mixed, not before devised, "to his three illegitimate daughters, B., C. and D., between them and the heirs of their bodies forever; *but if either of the said children should die before they arrive at the age of eighteen years, or marries, then the estate of the one deceased, to be equally divided between the surviving two, to them and the heirs of their bodies forever; and if two of the said children should die, before they arrive at the age of eighteen years or marry, then the portion of the two deceased, shall descend to the surviving one, and the heirs of her body forever; but if all the said daughters should die before they arrive at the age of eighteen years, or marry, and have issue thereby*, then all the cash, certificates, &c., and other property aforesaid, to be equally divided between E. F. G, &c. D, one of the daughters, intermarried with J. S, and died *after* attaining the age of eighteen years, but without issue. D's estate became absolute upon her arriving at the age of eighteen years, and upon her death, without

issue, did not vest in her surviving sisters. Cross-remainders between the daughters, are not be raised by implication in this case. And the Court will construe the word *or* as *and* to effectuate the intention of the testator; his intention being, that if either of the daughters should die under the age of eighteen years, unmarried, and without issue, that her estate should go over to her surviving sisters; but if either of them should attain the age of eighteen years, or should marry and have issue, that her estate, before contingent, should become absolute upon the happening of any one of these events. 356.

10. A. devises to his grandson B. a tract of land, "and in case B. died before he arrived at lawful age, or leaving no issue, then to his grandson C." B. arrived at full age, but died without issue. B. took a contingent fee under this devise, which became absolute upon the arrival of B. to full age; and the Court will construe the word *or* as *and*, to effectuate the intention of the testator; it being his intention that the estate should become absolute in B. upon B's having issue, or arriving at full age. 380.
11. A. devised all the residue of his estate to be "*equally divided between B, C, D. E's heirs and F.*" The distribution is to be made *per capita*, and each of E's children take an equal share with B. and the other legatees. 383.
12. A. devised his manor plantation to his son B. in trust, to apply and pay over the rents and profits to another son, C. during his life, and after the death of C. he devised the plantation to B. in fee-simple. In the year 1790, B. conveyed the plantation to C. in fee, with a proviso, "that if C. should die without a child or children, the plantation should revert to B. and his heirs." B. died in 1794, intestate, leaving two children, D. a son, and E. a daughter. At the time of his death, D. his son was heir at law. In 1795, the Legislature declared that sisters should be admitted to inherit lands equally with the brothers, to hold with the brothers as tenants in common. In 1798, C. died without leaving any child: and a question arose, whether D. who was the heir of his father at the time of the descent, or D. and E. who were the heirs at the time the reversionary interest of the father fell into possession, were entitled to the rents and profits of the plantation. Held that E. was entitled equally with D.; for whoever claims a fee simple by descent from one who was first purchaser of the remainder or reversion expectant on a freehold estate, must make himself heir to such purchaser at the time when such remainder or reversion falls into possession. 475.

Testator devised his lands "to be divided between his daughters, Amey and Jaca; and if either of them died before they came of age *or* married, the share of the one so dying to vest in and belong to the other." Jaca married and died before she came of age, in 1792. She had a brother, who died in her life-time, leaving children, who were her heirs at law under the act of 1784, c. 22, s. 3. The lands devised to Jaca, vested absolutely in her on her marriage, and upon her death descended to her heirs at law. The Court will not construe the word *or* copulatively, so as to render the happening of both events, viz: Jaca's marriage and her death under age, to be necessary to the absolute vesting of the estate in her, unless it be to carry into effect the intent of the testator; and where no intent appears rendering such a construction necessary, the word *or* shall be construed disjunctively. 494.

DISTRIBUTION—STATUTE OF.

A posthumous child is entitled to a distributive share under the statute of distributions. 233.

DONATIO MORTIS CAUSA.

A. on his death bed, directed B. to go into his field to a place pointed out and get a sum of money there deposited, which in the event of A's death, B. was to divide among A's children. This is not a "*donatio mortis causa*" to A's children. 127.

2. And B's acknowledgment of the above facts and of his having received the money is not good evidence thereof, to vest the money in him as trustee for the children of A, and defeat the statute of distributions. *Id.*

DOWER.

See EQUITY.

EJECTMENT.

See POSSESSION.

See PRACTICE.

ENLISTMENT OF SOLDIERS.

Under the act of Congress regulating the enlistment of soldiers in the army of the United States, where the father is dead and the son is without a guardian or master, "the consent in writing" of the mother, if she be alive, is necessary to make valid the enlistment of the son, if he be a minor—and such minor, enlisted without such consent, was discharged upon a writ of habeas corpus. 336.

EQUITY—EQUITY OF REDEMPTION.

1. Where no circumstances of *surprise, accident or fraud*, appear to have intervened in a case, to prevent a party from having a full hearing in the County Court, upon the points which form the ground of his application to the Court of Equity, and over which the County Court has equal and concurrent jurisdiction with the Court of Equity, an injunction will not be granted. 10.
2. A petition for rehearing a case will lie, notwithstanding a former petition has been preferred and denied, if the justice of the case demand a rehearing. It is a matter of course to grant a rehearing, if counsel will certify in its favour: but it is not a matter of course to grant a second rehearing. The Court ought to be satisfied with the reasons offered, before a second rehearing be granted. 11.
3. A widow dissents from her husband's will, and claims a distributive share of the crops growing on the lands devised. She files a bill in Equity against the executor for an account of the crops and a distribution of them, but charges no fraud. Bill dismissed on the ground that a Court of Equity has no original jurisdiction over the case. If the widow be entitled to a distributive share of the crops growing on the lands of her husband at the time of his death, she must seek to enforce it in the way pointed out by the act of 1791, ch. 22. This is not such a matter of account as will authorise a Court of Equity to take cognizance of the case. 96.
4. Dower having been assigned to the widow upon a petition at Law, Equity will not entertain a bill for the mesne profits during the detention of the dower, unless there be some equitable circum-

stance, such as loss of title deeds, or detention of such deeds, or a discovery is necessary. 128.

Damages for the detention of the dower are to be prayed for and recovered when the dower is allotted. If Defendant to a suit at law for dower die, pending the suit, damages are lost, and dower alone recovered. *Id.*

1. A. bequeathed two slaves by name to his widow during life; and in a subsequent clause of his will he bequeathed "the negroes therein mentioned, Pat, King, &c. (naming them, but omitting the names of the two given to his widow during life) to five of his children," adding "that the above that are not given away shall be equally divided among his said children." The negroes in the first clause are included in the second clause of the will and after the death of the widow go to the five children. 132.

Two of the children having died intestate before a distribution of the negroes was made, the next of kin cannot have a decree for distribution of their shares of the said negroes, against the administrator *de bonis non* with the will annexed, until the representatives of the deceased children are made parties. *Id.*

6. The purchaser of a tract of land dies before he pays the purchase money or receives a title, and by his will devises the land to his sisters who are aliens: his executors having been compelled to pay the purchase money, those who take the land after his death, take it subject to this charge, and are bound to reimburse the purchase money to his executors. And the land being sold by an order of the County Court upon the application of the guardian, for the purpose of discharging demands against his ward's estate, the ward being made a party Defendant to the bill filed for the purpose of having the purchase money reimbursed, demur to the bill. Demurrer overruled. 134.

7. A cause being heard upon bill and answer in 1787, and a decree made in favor of Complainant and two reports made in his favor since, a petition for a rehearing was directed on the ground that the answer denied the equity of the bill, and was to be taken as true, it not being replied to; and leave to reply to the answer refused on account of the length of time and death of parties and witnesses. 140.

See EVIDENCE.

8. A. is indebted to B. upon bonds, and in 1777 offers to pay in depreciated currency; the bonds are absent; B. refuses to accept the depreciated money, but agrees, that in consideration of A's having offered to pay, and the bonds being absent, no interest shall be thereafter charged until the bonds are produced and payment demanded in this State. Equity will enforce this agreement. 157.

9. A. pays to B. his co-executor, a sum of money belonging to their testator's estate; A. and B. die; C. the administrator *de bonis non* of the testator, brings suit against the representatives of A. who survived B, for an account of the testator's estate: the representatives of B. who received the money, must be made parties. 160.

10. If owing to the removal of one or more of the legatees of a testator from the State, or any other cause, the estate of the testator in his or their hands cannot be reached by the creditor here, the other legatees within the reach of the process of the Court are liable to the creditor for his whole debt, if their legacies amounted to so much: and if one legatee pay more of the testator's debts than another, it is a question of contribution between him and the other legatees. 177.

11. After the answer to an injunction bill has been filed, the bill cannot be amended before the hearing. 191.
12. Affidavits will not be received by the Court to support the allegations of an injunction bill. *Id.*
13. A. demised a lot in Wilmington to B. for five years, and in the indenture of lease, covenanted, that if B. at any time before the expiration of the lease, should be willing to purchase the lot, he would convey it to him upon payment being made to him of $700. Before the lease expired, B. elected to purchase the lot, and paid $70 of the purchase money. He failed to pay the balance before the expiration of the lease, and requested further time, which was allowed. He still failed to pay, and A. tendered to him the $70, brought an ejectment and recovered judgment. B. defended the suit, and failed to tender the balance of the money. He then filed a bill, offering to pay the balance, and prayed that A. might be decreed to receive the money, convey the lot, and be enjoined from disturbing his possession. Injunction granted, and decree made according to the prayer of the bill; for the day of payment not being expressly stipulated, and the contract of purchase in part performed, the Court will grant a reasonable time to B. to complete the contract; but he must pay the costs both at Law and in Equity. 207.
14. Complainant obtained an injunction, and died before the hearing of the cause. No administration being had on his estate, and the Defendant having put in his answer, moved that it be read, and the injunction be dissolved. Motion disallowed. 211.
15. To make the purchaser of a legal title a trustee for the *cestui que trust*, it is not necessary that he should have notice of the *particular cestui que trust*. It is sufficient if he have notice that the person from whom he buys is but a naked trustee. He ought to inquire and search out the *cestui que trust*. 219.
16. Complainant having neglected to plead *usury* to an action at law upon his contract, and having in his bill, shewn to the Court no reason for his neglect, and not having waived the penalty given by the statute for usury, a demurrer to his bill was sustained, and the bill dismissed. 225.
17. A. gives his bond to make title to a tract of land to B. and dies intestate, leaving three sons, his heirs at law, one of age, and the other two infants. B. dies; the administrators of A. recover of the executors of B. a judgment for the balance of the purchase money for the land. The executors and devisees of B. file a bill praying for a specific execution of the contract, as against A's heirs at law, and an injunction as against A's administrators, on the ground that part of the land was claimed by an elder title. The heirs, in their answer, declare their readiness to make title, and the administrators admit assets. Injunction dissolved, upon Defendants' giving security to make title agreeably to the prayer of the bill; and the costs ordered to be paid by A's administrators, out of the assets of their intestate. 290.
18. Pending an execution against A. he conveys his property to B. by a deed purporting to be absolute and for a valuable consideration; and it is agreed between A. and B, that when the execution shall be satisfied, B. shall reconvey the property to A. Equity will not enforce this agreement. No person is entitled to the aid of a Court of Equity to enforce a contract entered into with a fraudulent intention, or for a fraudulent purpose. Fraudulent conveyances are binding upon the parties making them. In applying the maxim, "that he who does iniquity shall not have equity," to particular cases, it is not necessary

that it should appear, that the iniquity was done to the person against whom relief is sought, although it must appear to infect the particular transaction out of which an equity is attempted to be set up. 321.

19. Pending a suit against A. as security for B, A. to defeat any recovery that might be made against him in said suit, conveys his property to C. by an absolute deed, purporting to be for a valuable consideration: and it is agreed between A. and C, that C. shall reconvey the property to A, whenever he shall be requested. It appears upon the trial of the suit against A. that the debt claimed of him has been paid by B, for whom he was security, and judgment is rendered in favour of A; upon which he filed a bill to compel C. to reconvey the property according to the agreement. Equity will not enforce this agreement, on account of its moral turpitude. 323.
20. An equity of redemption cannot be sold by virtue of an execution at law. (Before 1812.) 333.
21. A. and B. citizens of Virginia, sold a stud-horse to C. and D, citizens of this State, and made a false and fraudulent representation of his pedigree. C. and D. being sued on their bond for the purchase money, and judgment being recovered, filed their bill charging the fraud, and praying for an injunction. The injunction was granted, and A. and B. demurred to the bill, and for cause shewed, that it appeared from Complainant's own shewing, they had relief at law. Demurrer overruled upon two grounds. 1. That A. and B. reside in another State, and that C. and D. ought not to be sent beyond the jurisdiction of our own Courts to seek relief. 2. That it being a case of fraud, a Court of Equity will take cognizance of it, and at once save Complainants from an iniquitous recovery at law. 401.
22. A Court of Equity has the power to appoint the Clerk and Master of the Court, guardian to infant Defendants, to appear and answer for them; and can exercise this power without the consent of the Clerk and Master. 440.

See EVIDENCE. 15.

ESCAPE.

A paper writing, upon which a constable arrests a debtor and imprisons him, not running in the name of the State, nor being directed to any ministerial officer, nor purporting to be signed by a Justice of the Peace, cannot be deemed a judicial process; and the Sheriff is not guilty of an escape, in permitting the debtor thus imprisoned, to go at large. 445.

EVIDENCE.

1. A, as attorney in fact for B, conveyed lands to C, and afterwards he conveyed the same lands to D. Upon the trial of an issue directed by the Court of Equity, "whether the conveyance to B. was made to him upon a valuable consideration as a purchaser before the execution of the deed to D," A. is a competent witness. 45.
2. The articles of a horse-race being for five hundred dollars, *play or pay*, parol evidence admitted to prove that by the rules of racing, the money should be staked; and parol evidence cannot be admitted to shew that a bond given at the same time for $500, had relation to the articles, and that the meaning of the parties was that the money should not be staked; because such evidence is expressly rejected by the act of 1800, ch. 21. 137.

3. A. being subject to intoxication and on that account liable to imposition, and fearing that in some unguarded moment some person might obtain from him a conveyance of his lands, agrees with B. to convey the lands to him by an absolute deed, and B. agrees to hold the land as a trustee for C. one of the children of A. The conveyance being executed, C. and his agents remain in possession of the lands and B. does not call them to account for the rents and profits. B. dies and devises the lands to C. and D. as tenants in common. C. files a bill charging the above facts. D. answers and denies the trust, and insists that the lands were purchased by B. for a valuable consideration. Parol evidence will be admitted to prove the trust, as B did not take possession of the lands nor call C. to an account for the rents and profits. 141.
4. A to whom testator devises permission "to live six months in his house, if she chooses" is a competent witness to prove the will as to the real estate. 148.
5. Plaintiff offered in evidence a copy of a registered deed, offering to swear that he had not the original, and knew not where it was. Defendant had given notice to plaintiff to produce the original. The Court permitted the Defendant to shew that the original had been altered before its registration, and had been since destroyed by the approbation of the plaintiff. The copy was refused as evidence, and the plaintiff non-suited. 152.
6. A receives money for B and pays it to C, who says he is authorised by B. to receive it. B. sues A. for the money; C. is a competent witness to prove that B. authorised him to receive the money of A. 179.

See DEEDS.

7. A. and B. gave their joint bond to C., and D. became the subscribing witness. C. assigned the bond to D., who brought suit on the bond, against A. He pleaded the general issue, and upon the trial, the handwriting of D. and also of A. was proved. It was also proved, that on the day on which the bond bore date, A. had purchased goods of C. to the precise amount of the bond. This is not legal proof of the execution of the bond; and the Jury having found a verdict for the Plaintiff, the verdict was set aside, and a nonsuit entered, upon the ground that the production of the subscribing witness to a bond is never dispensed with, except from necessity; as where he is dead, has removed, or become interested by operation of Law. Here the subscribing witness has become the assignee of the bond, and the Plaintiff in the cause. 293.
8. A. and B. signed a written contract respecting a horse-race, agreeably to the act of 1800, ch. 21. B. and C. make a by-bet, and reduce it to writing, and therein B. agrees, "if A. should win the race which he had made with him that day, he agrees to pay C. one thousand dollars." A. won the race, and the stakeholder was directed by B. to deliver his bond for the $1000 to C. and the bond was delivered. C. sued B. and B. pleaded that the bond was delivered as an *escrow*. Ruled, 1. That the written contract of by-bet between B. and C, not referring to the written contract between A. and B. as to the race, there was not between B. and C, such a contract in writing, as the 2d section of the act of 1800, ch. 21, requires. 2. That parol evidence could not be admitted, to prove that the race referred to in the written contract of by-bet, was the race mentioned in the written contract between A. and B. 3. That the delivery

of the bond to C. by the stakeholder, by the direction of B, did not preclude B. from claiming the benefit of the act of 1800; and requiring C. to prove every thing required by that act to make the bond obligatory. 297.

9. Evidence to prove that the person under whom the Defendant claimed, was entry-taker at the time he made his entry, and that he did not make his entry in the manner directed by the act of 1777, ch. 1, (which declares the entry void unless made as the act directs) is inadmissible upon the trial of an action of ejectment. 401.

Although if the case were "*res integra*," the Court might give a different opinion, the construction which was early given to the act of 1777, ch. 1, not to vacate grants by parol evidence in actions of ejectment, ought not now to be departed from. *Id.*

In many cases, although a statute declares an act *void*, the Courts will construe it to mean that the act is only voidable. 401.

It is of more consequence, that the rules of property should be fixed and notorious, than that they should conform to the principles of justice. *Id.*

10. In assumpsit for goods sold and delivered by Plaintiff's testator, a specific legatee, not entitled to any share of the residuum, is a competent witness to prove the delivery of the goods, unless there be a *reasonable* probability that his specific legacy must be resorted to for the payment of debts; for without this reasonable probability, his interest is too remote to go to his competency. 406.

11. Upon the trial of issues of fact in a suit in Equity, a motion to read in evidence in his behalf Defendant's answer, which had been replied to, and its allegations disproved by more than one witness, was disallowed. 422.

12. It is no objection to the competency of a witness, that he is counsel for the Plaintiff, and intends, if the debt sued for be recovered, to charge a commission for receiving and remitting the money. 423.

13. In an action of trover for a negro slave, the Plaintiff offered in evidence a certified copy from the registry, of the bill of sale for the slave, he first making an affidavit, that the bill of sale was not in his possession or power; that he had delivered it to the register to be registered, and on application for it afterwards, was told by the register that it was lost. There was a subscribing witness to the bill of sale, who resided in the State, and he was not produced as a witness. Held, that the copy should not be received in evidence: 1. On account of the insufficiency of the proof as to the loss of the original; 2. Because the act of 1792, ch. 6, requires that in all trials where the title of a slave is evidenced by a written transfer, the execution of such writing shall be proved by the subscribing witness, if alive, and within the State; and there cannot be less reason for requiring the subscribing witness, where a copy is offered in evidence, than where the original is offered. 424.

14. A. having sold a slave to B., and given to B. a written instrument, setting forth "that for the consideration of $300, he had sold the slave to B., and that he would warrant and defend the slave against the claims of all persons," but setting forth nothing as to the soundness of the slave; B. shall not be permitted to set up a parol warranty of soundness, and recover on it against A.: for this would be to add by *parol* to a written instrument. The parties, by making a written memorial of their transaction, implicitly agree, that in the event of any future

misunderstanding, that writing shall be referred to as the proof of their act and intention: that such obligations as arise from it by just construction or legal intendment, shall be valid and compulsory on them, but that they do not subject themselves to any stipulation not set forth in the writing. For if they meant to be bound by any such, they might have added them to the writing, and thus have given to them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness. Where anything forming part of the contract, is left out of the writing by fraud or accident, or any thing forming no part of the contract, is inserted by fraud, parol evidence may be received to prove these facts. But where nothing is omitted or inserted in the writing, by fraud, accident or mistake, parol evidence shall not be received to shew that the agreement of the parties was otherwise than the writing sets forth. 426.

15. Bill to redeem. Complainant charged that he borrowed $800 of Defendant, and to secure the repayment thereof, had executed to Defendant an absolute deed for certain lands; that it was agreed between him and the Defendant, that he might redeem the lands, and that Defendant, upon receiving his money with interest, should reconvey them: but it was agreed that this part of their contract should not be put in writing, and that, *as to it*, Complainant should *trust to the Defendant's word.*" Defendant, in his answer, denied the parol agreement charged in the bill, and set up an absolute purchase of the lands. Held, that parol evidence cannot be received to prove the agreement charged in the bill: for such evidence would contradict the deed of Complainant. 449.

EXECUTION.

1. Motion to stop money *in transitu*, which has been paid into the office upon an execution at the instance of B, and to apply the money to the discharge of a judgment against C, is not allowed of course, and will not be allowed unless good cause be shewn. 47.
2. A. and B. having obtained judgments before a justice of the peace, sued out executions, which were levied upon the lands of the Defendant; and the executions so levied were returned into the county court for orders of sale. The executions were levied on different days, but the orders of sale were made at the same term of the Court, and writs of *renditioni exponas* were issued thereon. At the same term, C. obtained a judgment in Court against the Defendant, and sued out a *fieri facias*, which was levied upon the same lands: and the Sheriff sold the lands under all these executions, and paid the money into Court; and it being insufficient to discharge all the executions, application was made to the Court for an order of distribution. The execution from the justice, which was *first levied*, is to be first satisfied: and the money is to be distributed according to the priority of the levy of the executions. 266.

See PRACTICE, 13.

FERRIES.

See ROADS.

FORCIBLE ENTRY AND DETAINER.

In an inquisition of forcible detainer, the proceeding being of a civil nature, the Court will grant a new trial if the Jury find contrary to evidence. 392.

FRAUDULENT CONVEYANCES.

1. Pending an execution against A. he conveys his property to B. by a deed purporting to be absolute and for a valuable consideration; and it is agreed between A. and B, that when the execution shall be satisfied, B. shall reconvey the property to A. Equity will not enforce this agreement. No person is entitled to the aid of a Court of Equity to enforce a contract entered into with fraudulent intention, or for a fraudulent purpose. Fraudulent conveyances are binding upon the parties making them. In applying the maxim "that he who does iniquity shall not have equity," to particular cases, it is not necessary that it should appear that the iniquity was done to the persons against whom relief is sought, although it must appear to infect the particular transaction out of which an equity is attempted to be set up. 321.
2. Pending a suit against A, as security for B, A. to defeat any recovery that might be made against him in said suit, conveys his property to C. by an absolute deed, purporting to be for a valuable consideration; and it was agreed between A. and C, that C. should reconvey the property to A. whenever he should be requested, It appeared upon the trial of the suit against A, that the debt claimed of him had been paid by B, for whom he was security, and judgment was rendered in favour of A; upon which he filed a bill to compel C. to reconvey the property according to the agreement. Equity will not enforce this agreement, on account of its moral turpitude. 323.

GENERAL ASSEMBLY—POWERS OF.

1. The 41st section of the Constitution declares "that schools shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged and promoted in one or more Universities." In obedience to this injunction of the Constitution, the Legislature established an University, and in the year 1789, granted to the trustees thereof "all the property that had theretofore or should thereafter escheat to the State." In the year 1800, the Legislature repealed this grant. Held that this repealing act is void. 1. It being in violation of that section of the Constitution which directs the General Assembly to establish an University. When established, it is the University of the people, and not of the General Assembly, who are the mere agents of the people in doing the act. When endowed, its funds are beyond the control of the General Assembly; otherwise, as it cannot exist without funds, the General Assembly might destroy it. 2d. It being in violation of the fundamental principles which protect private rights. 3d. It being in violation of the 10th sec. of the Bill of Rights, which is a part of the Constitution, and which declares, "that no freeman ought to be taken, imprisoned, or disseised of his freehold, liberties or privileges, or outlawed, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land." The word "liberties" in this section, signifies the privileges and rights which corporations have by virtue of the instruments which incorporate them; and is here used in contradistinction to the word "liberty," which refers to the personal liberty of the citizen. The section intended to secure to corporations as well as to individuals the rights therein enumerated. The words "law of

the land" mean "the lawful proceedings of the *proper tribunals* of the country." And the entire section means "that neither corporations nor individuals shall be deprived of their liberties or property, unless by a trial in a Court of Justice, according to the known and established rules of proceeding derived from the Common Law, and such acts of the Legislature as are consistent with the Constitution." 58.

2. Escheated lands vested in the State without an inquisition or office found; and the act of 1789, conveyed these lands to the trustees of the University. The clause of the Constitution which declares that "all commissions and grants shall run in the name of the State of North-Carolina, and bear teste and signed by the Governor," does not restrain the Legislature from conveying lands by a solemn act of their body without grant. 82.

GRANTS.

1. A Court of Law will receive parol evidence to shew that the officers of state have issued a grant for lands forbidden by law to be entered and granted: and will take notice that such grant is void and that nothing passes by it. 162
2. Where a grant has issued irregularly, the party wishing to avoid it, must apply to a court of equity. *Id.*
3. The act of 1783, ch. 2, forbids entries or surveys to be made of certain lands set apart for the Cherokee tribe of Indians. In 1791 this tribe in a treaty made with the general government, "relinquish, release, and cede these lands." The right of the Indian tribes to lands is regarded by the European and American governments as a mere possessory right: and the cession of this right by the Cherokee tribe, vested the right in North Carolina, and the United States were the agents of North Carolina for that purpose. 162.

GUARDIAN.

1. Under the act of 1762, ch. 5, the County Court is not bound to appoint as guardian the next of kin or the person chosen by a minor above fourteen years of age; but may and ought to appoint that person, who, in their discretion, they believe will best execute the duties of the appointment. 38.
2. The choosing of a guardian by orphans in Court, does not necessarily destroy the authority of a former guardian. The Court can at any time remove a guardian upon proper cause shewn, and in the appointment of a successor have entire discretion. 227.
3. The County Court is not bound to confirm the choice of a guardian made by an infant of fourteen years of age and upwards. Under the act of 1762, ch. 5, the Court may exercise a discretion in appointing a guardian, independent of any choice which the infant may make. 231.

HEIRS AND DEVISEES.

Judgment of execution against the real estate of a deceased debtor in the hands of the heirs and devisees, reversed, because it was not found that the executrix had fully administered, had no assets or not sufficient to satisfy the creditor's demand. 97.

HORSE-RACING.

1. In articles of agreement to run a horse-race, signed and sealed by the parties, where the weight to be carried by each horse is mentioned, the riders must be weighed after they come through

the poles: and parol testimony is not admissible to prove that the parties agree not to weigh out. 22.

By the articles, the nags were to be turned thirty feet from the starting poles, and to be run *the first time they were locked.* If the conduct of the other party be fair, the party claiming the stakes must shew that the nags were locked after being turned to run. *Id.*

2. The opinion of judges chosen by the parties to a race is not conclusive; and if they be either mistaken or corrupt, their opinion ought to be set aside, and the justice of the case disclosd by other testimony. 33.
3. In all racing contracts it is incumbent on the Plaintiff to bring his case within both sections of the act of 1800, ch. 21. 38.

INDICTMENT.

1. Indictment for perjury. Perjury may be committed in answering a question that has no relation to the issue, if asked with a design to impair the credit of the witness as to those parts of the case which are material and important to the issue, particularly if the witness be cautioned as to his answer. For, if it appear plainly that the scope of the question was to sift the witness as to his knowledge of the substance, by examining him strictly concerning the circumstances, which afterwards appeared to be false, he may be guilty of perjury, inasmuch as nothing can be more apt to incline a Jury to give credit to the substantial part of a man's evidence, than his proving to have an exact and particular knowledge of all the circumstances relating to it. 125.
2. Indictment contains two counts; one for a mayhem under the statute, and charges the defendant with aiding and abetting the mayhem, the other for an assault and battery; Defendant acquitted upon the first count, and convicted upon the second. Judgment cannot be rendered against defendant upon this conviction. 134.
3. In an indictment for perjury, the style of the court before which the perjury is alleged to have been committed must be legally set forth; therefore, where the indictment charged that the false oath was taken "at a certain *Superior Court* begun and held for the District of Hillsborough," the judgment was arrested. 156.
4. Motion to quash an indictment. In cases of doubt, the Court will not quash an indictment. It is due to the State, and to the rights of the citizen, in such cases, to have the facts enquired into by a Jury, and if the facts charged be affirmed by their verdict, the Defendant can have the same advantage of legal points upon a motion in arrest, as upon a motion to quash. Therefore, the Court refused to quash an indictment, which charged "that the Defendant, fraudulently intending to injure A. B., unlawfully and fraudulently procured a certificate of a survey on an entry of lands in the entry-taker's office of Brunswick county, to be made by C. D. the surveyor of said county; which certificate set forth that the lands described therein had been surveyed, and that H. and G. were chain-carriers; when in fact and in truth, the lands described in the certificate were not surveyed, and when, &c. H. and G. were not chain-carriers." 213.
5. Profane swearing, independent of the disturbance and injury which it may produce to those who hear it, is not indictable; it is cognizable before a justice of the peace, under the act of 1741,

ch. 14; but where it is charged as a nuisance, and there is evidence to support the charge, it is indictable. Therefore, a motion to arrest the judgment, upon an indictment which charged, "that the Defendant swore several oaths in the court-yard during the sitting of the Court, to the great disturbance and common nuisance of the citizens necessarily attending said Court," was overruled. 254.

6. The State is not entitled to an appeal in a criminal prosecution. 257.
7. A witness for the State who is called out upon his recognizance, and has judgment *nisi*, for the forfeiture, entered against him, may apply to the Court for a remission of the forfeiture before a *scire facias* issues against him. 269.
8. An accessory is not liable to be tried, as for a misdemeanor, where the principal is amenable to justice. The act of 1797, ch. 19, does not infringe this rule. That act only extends to cases "where the principal escapes and eludes the process of the law." 270.
9. The caption of an indictment must describe the Court before which it is found, that it may appear the Court can exercise jurisdiction over the offence charged. 281.
10. Solicitor for the State is entitled to a fee in case of a *scire facias* against a delinquent Juror, in all cases where costs are given against such Juror. 287.
11. The prosecuting officer for the State has a discretionary power to indorse the Governor as prosecutor on bills of indictment, whenever he may think the public interest may require it. 435.
12. The Superior Court of one county has no jurisdiction of criminal offences committed in another county, although both of the counties belonged to the *same Judicial District*, before the act of 1806, ch. 2. 442.
13. In an indictment for murder, where the death is occasioned by a wound, bruise, or other assault, *the stroke* must be *expressly laid*. But an indictment, charging "that A. B., with a certain stick, &c. in and upon the head and face of C. D., then and there feloniously, &c. did strike and beat, *giving* to the said C. D. *then and there* with the stick aforesaid, in and upon the head and face of the said C. D., several *mortal wounds*, of which said several mortal wounds, the said C. D. instantly died," is good: for there is in the first clause a direct allegation of a stroke, and the participle *giving* and the words *then and there*, connect this allegation with the mortal wounds in the second clause. In an indictment charging "that A., feloniously, and of his malice aforethought, assaulted B., and with a sword, &c. *then and there* struck him, &c." the first allegation, of *feloniously and of his malice aforethought*, applied to the assault, runs also to the stroke to which it is essential. Where, in an indictment for murder, the death is charged to be occasioned by *a wound*, a description of the wound must be set forth in the indictment, its length, breadth, depth, &c. where they are capable of description; and the omission of such description is fatal to the indictment. Where the death is charged to be occasioned by *a bruise*, a description of its dimensions, &c. is not necessary. 452.

INDIANS.

See GRANTS.

1. The right of the Indian Tribes to lands is regarded by the Euro-

pean and American governments as a mere possessory right. 168.

2. The government of the United States as well as the governments of the several States have claimed and respected in each other the claim to exclusive jurisdiction and title to territory occupied by the Indian Tribes. 168.
3. The treaty, therefore, of 1791, with the Cherokees, cannot be considered as conveying *a title to the soil* of any part of this State to the United States. It can only be received as a relinquishment of that possessory right which alone had been yielded to the Indians. This right did of course vest according to the precedent claims of North Carolina, known and admitted by the United States. The treaty was made by the United States, because by the Federal Constitution, the General Government had been made the agent of North Carolina for that purpose. *Id.*

☞ The grounds on which entries of lands acquired since 1777, from the Cherokees, are considered to be valid, explained by LOCKE, Judge. 165.

INFANTS.

See EQUITY, 22.

INSOLVENT DEBTORS.

See CREDITOR AND DEBTOR.

An action cannot be maintained upon a bond given by a person arrested upon a *ca. sa.* to keep within the limits of the rules of the prison; for the act of 1759, ch. 14, gives to such bond *the force of a judgment*, and authorises the creditor to have execution thereon, upon motion in Court. 421.

JURISDICTION OF SUPERIOR COURTS.

See INDICTMENT, 12.

LEGACIES.

Testator directs his debts to be paid out of his personal estate; charges his real estate with the maintenance of his wife; gives £1000 to an only daughter; and after giving other pecuniary legacies, he gives the remainder of his estate to his three sisters. The personal estate is exhausted in the payment of debts; and held that the legacy of £1000 to the daughter is a charge upon the real estate. 192.

LIMITATION OF ESTATES.

A gift of a chattel to a person, with a reservation of a life estate therein to the donor, is good, and vests a property in the donee; because the reservation, being inconsistent with the estate created by gift, is void. 466.

LIMITATIONS, STATUTE OF.

1. Seven years possession without colour of title is no bar to the right of entry. 14.

   Reasons on which this construction of the third and fourth sections of the act of 1715, ch. 27, is founded. From 21 to 30 in note.

   Inconvenience resulting from this construction. From 30 to 32 in note.
2. Neither the act of 1800, repealing the law granting escheated lands to the trustees of the University, nor bringing a suit by the

escheator under the act of 1801, suspends the statute of limitations as to the trustees whose right was sought to be divested by those acts. 185.

3. Act of 1715, ch. 48, barring the claims of creditors against the estates of deceased debtors. A. demised lands to B. and B. covenanted in the indenture of demise to pay $50 annually for the rent. The demise was made in 1790, and B. died in 1794, having had possession of the premises until his death. The demise expired in 1803, no rent having been paid. A. sued the executor of B. upon the covenant of the indenture, for the rents: the suit was brought in 1804, and the executors pleaded the act of 1715, ch. 48, in bar. Plea sustained; for the Defendants are not sued upon their own possession, but upon the possession of their testator, upon his pernancy of the profits of the demised premises, and not their own; and they must answer as his representatives. The act bars after seven years from the death of the testator, although great part of the rent *did not become due* until more than seven years after his death; no notice of the debt having been given to the executors within the seven years. 202.
4. Colour of title. A devise is colour of title, and seven years possession under it bars the right of entry. 413.
5. A constructive possession of lands under colour of title, for twenty-one years, under known and visible boundaries or lines, will not bar the right of entry under the State. 414.
6. Nor will the actual possession, for twenty-one years, of different parts of the lands covered by the colour of title, by purchasers from him to whom the colour of title was made, avail him as to the part of the lands not sold and actually possessed; for they are distinct tracts held by different persons in different rights. *Id.*

MORTGAGE

1. A creditor agrees with his debtor after judgment, to levy his execution on the whole of the debtor's property, and purchase it in at the sale, and hold it as a security for his debt; equity will permit the debtor to redeem the property. 116.
2. It is a general rule, that wherever a conveyance or assignment of an estate is originally intended as a security for money, whether this intention appear from the deed itself or any other instrument, it is always considered in equity as a mortgage, and the estate redeemable, even though there be an express agreement of the parties, that it shall not be redeemable, or that the right of redemption shall be confined to a particular time, or to a particular description of persons. In applying this rule to particular cases, a Court of Equity will often ascertain the fact, whether the conveyance was intended as a security for money, however absolute it may appear; and will lay hold of all the circumstances of the transaction to ascertain this fact; such as the value of the estate conveyed and the sum given therefor, the bargainee not being let into the immediate possession of the estate, his accounting for the rents and profits to the bargainor, &c. 117.
3. Circumstances which incline the Court to construe a transaction to be a *conditional sale*, and not a mortgage. Among others, 1st. The money advanced being equal, or nearly so, to the value of the goods conveyed. 2d. A stipulation in the contract of the parties, that he who advances the money and receives the goods, shall hold the goods subject to the claim of him from whom he receives them, until a particular day, and subject to his loss

if they be destroyed by that day; but to hold them free from such claim after the day, and subject to his own loss if they be destroyed or perish after that day. 488.

4. In mortgages, the want of a covenant for the repayment of the mortgage money is no bar to a redemption: nor in such case is the mortgage without remedy, although the goods be destroyed or not of value sufficient to pay the debt. In Equity he may recover the money from the mortgagor; for every mortgage implies a loan, and every loan a debt. *Id.*

NEW TRIAL.

1. In an ejectment, the Court ordered a second new trial, because the verdict was contrary to evidence. 40.
2. The Court will not grant a new trial upon the affidavit of one of the Jurors, that he did not assent to the verdict. 94.
3. Facts known to a party before trial, but omitted to be proved, upon a belief that the evidence offered was sufficient, no good ground for a new trial. 115.

NOTICE.

1. The principle that notice to an agent is notice to his principal, does not apply to the case of surveys of entries of land made by public surveyors, in the discharge of their public duties. 121.
2. The principle applies only to cases where there is a special trust or confidence reposed in the agent *at* the time of the transaction, or *after it*, by the acceptance of the purchase by the principal. *Id.*
3. Entry taker's books no notice of an entry having been made. *Id.*
4. If a scrivener or attorney who draws a mortgage to secure the payment of money, has notice of a prior mortgage, this is constructive notice to the last mortgagee.
5. Where a father, having notice that lands are contracted to be sold, purchases the lands and takes a deed to his son and his heirs; the son, being a volunteer, is a trustee of the legal estate for the first purchaser. *Id.*

PARTITION, BRINGING INTO HOTCH-POT.

1. In making partition, so much of the ancestor's lands acquired by him after making his will, as are conveyed to a child by way of advancement, are to be valued at the time of the conveyance; and the residue of the lands to be valued at the time of the ancestor's death. 93.
2. What shall dissolve a tenancy in common. A. and B. being tenants in common of a tract of land, situate in an island in the Cape Fear river, agree by deed, "that as to those lands on the said island which lie below the causeway or great road through the island, A's two-thirds shall be taken all together, and shall begin at the lower end of the said island, and be bounded by the North-West river on the one side, and by the North-East river and Great creek, on the other; and B's one-third shall be taken off of the remainder, lying above the said A's and below the said causeway; and as to all that part of the island belonging to them, lying above the said causeway, A's two-thirds shall be taken next the thoroughfare and North-East river, and the said B's one third shall be taken next the causeway." This agreement is sufficiently certain for each tenant to know his share, and dissolves the tenancy in common. 302.

PENALTY.—PENAL BONDS.

1. The act of 1794, ch. 2, declares, "that every person who shall knowingly sell, buy, or hire a slave imported into this State by land or water, contrary to the provisions of that act, shall forfeit and pay the sum of one hundred pounds." A. having purchased a slave, not knowing at the time of the purchase that he had been imported contrary to the provisions of the act, sold the slave to B, knowing before this sale, of the illegal importation. This sale does not subject him to the penalty. 168.
2. In a suit upon a penal bond, the Plaintiff is not entitled to recover beyond the penalty. 275.

   See REPEAL AND PENAL STATUTES.

3. The act of 1808, ch. 12, sec. 3, declares the appointment of deputy clerk of the County Court, to be incompatible with the office of a justice of the peace; and further declares "that, if after the passing of the act, any person holding the office of justice of the peace, shall *accept* the appointment of deputy clerk, his office as a justice of the peace, shall be vacated; and if, being deputy clerk *he accept* the office of justice of the peace, his appointment as deputy clerk, shall be vacated: and if any person shall presume to act in any of the said offices, contrary to the true intent and meaning of the act, he shall forfeit and pay the sum of fifty pounds." This act does not extend to the case of a man who was both deputy clerk and justice of the peace *before the* passing of the act; and who subsequently continued to act as a justice of the peace, without resigning his appointment as deputy clerk. 485.

PERJURY.

See INDICTMENT.

PLEAS AND PLEADING.

To an action against the administrator, he pleaded "fully administered, generally and specially. *no assets but to the amount of £120, which are liable to a suit; Slade and Jocelyn, against Defendant.*" At the next term he pleaded as a plea since the last continuance, "*a judgment confessed in favor of Slade and Jocelyn, and other judgments.*" To this plea the Plaintiff demurred generally. Demurrer sustained and plea overruled. 39.

See ABATEMENT.

2. To the plea of set-off, there may be a double replication: for the set off is in the nature of a cross action, and the person pleading it, is to be considered (as far as respects this plea,) in the light of a Plaintiff, and bound to produce the same testimony to support it that would be required to enable him to recover in that character: and the Plaintiff, against whom the set-off is pleaded, ought to be permitted, by way of replication, to make the same defence which the law would permit him to enter by way of plea, had he been originally sued. 155.
3. Debt to recover £100, the penalty imposed by the act of 1794, ch. 2, for importing a negro slave into the State. The writ called upon the Defendant to answer "James Turner, Governor, &c. of a plea that he render to him £100," &c. The declaration stated, "Benjamin Forsyth, who sues in this behalf, as well for his Excellency James Turner, now Governor of the State, &c. as for himself, complains of William Horton, &c., that he

render to James Turner, now Governor, &c., and the said Benjamin, who sues as aforesaid, £100," &c. Variance between the writ and declaration, pleaded in abatement. Plea sustained. 212.

4. Judgment *quando acciderint* was rendered against an administrator for £1835, 4*s.* 2*d.* To be discharged by the payment of £917, 12*s.* 1*d.* Plaintiff sued out a *scire facias*, suggesting assets, and reciting a judgment for £911, 12*s.* 1*d.*; but not reciting it as a judgment *quando*, &c. *Nul tiel record* and *no assets* were pleaded to the *sci. fa.* The Court sustained the plea of *nul tiel record*, and gave judgment for the Defendant. Plaintiff moved to set this judgment aside, and for leave to amend his writ of *sci. fa.* The judgment was set aside, and leave given to amend on payment of costs. 412.

POSSESSION—ADVERSE.

See DEEDS.

Part of the lands to which defendant set up claim was included within his fence and he was in the actual adverse possession thereof at the time of the conveyance to the lessors of the Plaintiff. The plaintiff is not entitled to judgment for the lands lying within defendant's fence. 138.

POWERS OF ATTORNEY.

1. A power of attorney executed in 1772, in Ireland, to sell lands in this State, and proved before the Mayor of the city of Carrickfergus, in 1774, and the probate certified under the seal of the Mayoralty, is not admissible in evidence; as there was no law before 1793, for the probate and registration of such powers of attorney. 194.

And this defect is not cured by a registration of the power of attorney, under the private act of 1782, ch. 36, sec. 3, which directs, "that this power of attorney shall be admitted *to probate and registration* in the county of Wilkes, and be as good and valid as if the confiscation acts had never passed," for by this act a *future probate* as well as registration were necessary to give validity to the power of attorney. *Id.*

2. There being no law before 1793, for the probate and registration of powers of attorney to sell lands, a power of attorney proved before a Judge of our Superior Courts, in 1779, and registered upon his certificate of probate, is not admissible in evidence. *Id.*

PRACTICE.

1. Upon the suggestion of the Defendant's death, his administrator ought to be made a party by a *scire facias;* and an order "that the administrator be made Defendant, unless he shew cause," being served upon the administrator, he appeared and shewed for cause, that the order was irregular and improper; whereupon the rule for making him a party was discharged. 44.

2. A. being administrator of B. was summoned as a garnishee in a case pending in the county court. He was examined and an issue was made up and found against him. He prayed an appeal, but did not give bond for the prosecution thereof, until the next Term; in consequence of which the appeal is dismissed. A writ of certiorari will lie to remove the case to the Superior Court. 94.

See ABATEMENT.

3. Rule for a new trial entered, *nunc pro tunc*, the clerk having omitted to enter it at the proper time. 100.

See WILLS.

4. On the abatement of a suit by the death of the Plaintiff, execution ought not to be issued for the costs, until a *scire facias* has issued to the representatives of the Plaintiff. 113.
5. Plaintiff having lost the bond declared on, after an appeal from the judgment of the County Court, is permitted to prove the contents thereof upon the trial in the Superior Court, and to recover judgment without amending his declaration. 121.
6. A judgment of the County Court not being lessened in the Superior Court, bears ten per cent. interest up to the time of rendering judgment in the Superior Court. 131.
7. The sum levied upon an execution being insufficient to discharge the Plaintiff's judgment, must be applied solely to his use; and the costs of the Defendant's witnesses are not to be paid out of the sum thus levied. 140.
8. The return of *two nihils*, good service of a *scire facias* against bail. 187.
9. Motion to file a new declaration in ejectment, the original being lost out of the office, and Defendant served with notice to produce a copy, disallowed. 268.
10. A witness for the State is called out upon his recognizance, and the judgment of the Court for the forfeiture, is entered against him, *nisi:* He may apply to the Court for a remission of the forfeiture before a *scire facias* issues against him. 269.
11. After verdict, the Court will not arrest the judgment, because the writ is *tested* by the Clerk, and *signed* by the Deputy Clerk. The stat. 5. George 1st. ch. 13, is in force, and cures defects in the writ, by verdict. 339.
The 25th section of the Constitution is intended merely to prescribe an uniform mode of issuing writs. *Id.*
12. An order entered of record for a *scire facias* to issue to make the representatives of a deceased Defendant a party to a suit, will prevent an abatement of the suit. 441.
13. A. having recovered a judgment against B. sued out a *fi. fa.* and before the return of it he died. *After* his death, he having no representative, another *fi. fa.* was sued out in his name. This *fi. fa.* was set aside as having issued erroneously. 492.
14. A. having recovered a judgment against B. in the County Court, B. prayed an appeal to the Superior Court, which was granted, upon his entering into bond with *one* security only. On motion of A. in the Superior Court, the appeal was dismissed; for the act of 1777, c. 2, is peremptory in requiring two securities. And the motion to dismiss prevailed after the record had been in the Superior Court three years, and sundry orders made in it. 495.

PROCESS.

1. The return of *two nihils* is good service of a *scire facias* against bail. 187.
2. Defects in warrants must be pleaded in abatement; they cannot be taken advantage of after verdict upon motion to arrest the judgment. 252.

See PRACTICE, 11, 13.

PROMISSORY NOTES—BILLS OF EXCHANGE.

An executor or administrator may assign the securities of his testator or intestate, without naming himself executor or administrator. 133.

REPEAL OF PENAL STATUTES.

The repeal of an act of Assembly giving a forfeiture for an offence, is a repeal of all forfeitures incurred under the act repealed, unless there be a special exception to the contrary. 465.

A. sues B for the forfeiture of £100, given by the act of 1794, for buying a slave, knowing him to have been imported contrary to that act. Pending the suit, the act is repealed, and the repeal is pleaded in bar. The plaintiff demurs to the plea. The demurrer overruled, and the plea sustained. 465.

ROADS AND FERRIES.

1. The County Court rejected a petition for an order to lay out a public road; the petitioner appealed to the Superior Court. The appeal cannot be sustained. 118.

By the act of 1784, ch. 14, the power and authority to lay out public roads, is vested in the County Courts: they are to judge *where* roads shall run, *when* or *how* changed or discontinued. When they have exercised this power, and declared a public road shall be laid out, a jury shall be summoned to lay it out to the greatest advantage of the inhabitants, and to assess damages to persons who may be injured by such road going through their lands. No judicial authority is vested in the Jury with regard to the propriety or impropriety of such road; that power rests with the Court, and when once exercised, the Jury are bound to carry their order into effect. *Id.*

The party praying for an order to have a road laid out, cannot, under the act of 1784, ch. 14, have the case examined in the Superior Court. For, 1. The laying out of roads was considered to be a matter of mere county police. 2. An appeal will not lie, because there are no parties to the proceedings. No Defendant or Defendants to whom an appeal bond could be given, or against whom judgment could be given, for costs. 119.

2. The General Assembly having authorised the County Courts of Camden and Pasquotank to appoint commissioners to lay out a road, and having authorised John Hamilton to erect toll-gates on the said road and exact toll; the commissioners laid out the road across the lands of Enoch Sawyer; and their report being returned to Court, was set aside, on the ground that Sawyer had no notice. 253.

3. The County Court may grant to a man the privilege of erecting and keeping a ferry, although he do not own the lands on either side of the river or creek, over which the ferry is established. 279.

SET-OFF.

See PLEAS AND PLEADING.

Debts which can be set-off, must be such as are due in the same right: therefore, where A. gave his note to B, *administrator of the estate of C*, and B. assigned the note to D, who sued A.; A. was not permitted to set-off a note given by B. to E, and by him assigned to A, nor a note given by B. to him. 353.

SHERIFFS—SHERIFFS' SALES—SUMMARY REMEDY AGAINST.

1. A Sheriff cannot purchase property at his own sale; if he bid off property, the bidding is void. Nor can a Sheriff sell at private sale. property levied on by him by virtue of an execution. 35.

2. A Sheriff is not *fineable*, who returns his execution within the time prescribed by Law, but fails to return the money made thereon into Court, or to pay it to the party or his attorney. 255.
3. Sale of lands for taxes. It is not incumbent on a purchaser of lands sold for taxes acknowledged to be due, to shew on the trial of an ejectment brought against him by the person who was bound to pay the taxes, anything more by way of defence, than the Sheriff's deed for the lands so sold. If such purchaser be Plaintiff in the ejectment, he must also shew that the title to the lands is out of the State. The title being out of the State, the taxes are *a lien* upon the lands, into whosoever hands they may pass; and it behoves the present holder of the lands to see that the taxes have been paid: for if the Sheriff, in his advertisement of sale for the taxes, mistake the name of the owner of the lands, or their local situation, the purchaser at such sale shall hold the lands. The acts which make it the duty of the Sheriff to advertise the sale in some newspaper printed in the State, and at three public places in the county, and set forth the names of the owners of the lands, the water courses on which the lands are situate, &c., are merely directory to the Sheriff in the discharge of his duty. His neglect to observe these directions may subject him to a suit for damages at the instance of the party injured by the neglect; but it will not affect the title of the purchaser, unless there be collusion between him and the Sheriff. The Sheriff's authority to sell, rests upon the fact, *that the taxes have not been paid.* If, therefore, it appear that the taxes have been paid, the purchaser at the Sheriff's sale gets nothing by his purchase. 311.
4. The summary remedy against delinquent Sheriffs, given by the act of 1808, ch. 21, applies as well to cases where the delinquent is out of office, as where he is not; and also applies to arrearages due by the delinquent previous to the passing of the act; which act is a beneficial one, and is to be construed liberally. 500.

TAXES.

A billiard table erected and used merely for the purpose of amusement, is liable to the tax imposed on "billiard tables," in the same way as if used for the purpose of gaming. 201.

TRESPASS.

To an action of trespass for an assault and battery, brought against six Defendants, they, having employed different counsel and served in their defence, pleaded *not guilty* severally. The issues were all submitted to the Jury at the same time, and four of the Defendants were found *guilty* and two *not guilty*. The Defendants found not guilty are entitled to their costs severally, including each an attorney's fee. 40.

TROVER.

A bequeathed negroes and other personal property to his wife during her life, and after her death to be sold and equally divided among his children. After her death, B. converts the property to his own use: the executors of A. can bring trover for this conversion. 189.

VENDOR.

The vendor of goods is liable for affirming the goods to possess a quality which would increase their value, if it turns out that the goods do not possess this quality, although the vendor did not know that the affirmation was false. 97.

WARRANTY.

1. An express warranty excludes an implied one. 138.
2. In the contract of sale, the law implies no warranty as to the quality of the goods sold, although it may imply a warranty of title, where the vendor is in possession at the time of the sale. *Id.*
3. The words in an instrument of writing that "A. had sold to B. a negro man by the name of Jim, and that he doth warrant the *aforesaid slave* to be sound and healthy, and not above twenty-five years of age," do not amount to a warranty that the negro is a slave. The word "slave" is merely descriptive of the person to whom the warranty of soundness, &c. is to be applied. *Id.*
4. The express warranty as to soundness and age excludes any implied warranty as to the other qualities. The law will not imply what is not expressed, where there is a formal contract. *Id.*

WILLS—PROBATE OF—REVOCATION OF.

1. The probate of a will may be set aside after the term expires at which the will was proved and a second probate be ordered by the same court: and upon an application for a re-probate, the court will look to all the circumstances of the case, to aid its discretion in allowing or rejecting the application. 99.

   See EVIDENCE.
2. The testator signs his will and it is attested in his presence by one witness. He then inserts the *date* and the words *dearly beloved*, and has it attested in his presence by another witness; and then he acknowledges the execution of the will in presence of both witnesses. This is a good execution of the will to pass the real as well as personal estates of the testator. 176
3. As the statutes of devises, 32 and 34 Henry 8th, declare that "a man *having* lands may devise them," lands acquired subsequent to the devise do not pass by it, although the devisor expressly refers to *all the lands he might have at his death;* for at the time of the devise he *had not* the lands. 258.
4. Yet if the testator had no estate in the lands at the time of the devise, and he devised them for the payment of debts, or afterwards acquires them, a Court of Equity will decree a sale of them. *Id.*
5. Lands acquired subsequent to a devise, pass by a new publication of the will. At what time a will shall be considered *as published*, under the act of October, 1784, ch. 10, sec. 5. Under this act there are two classes of cases, 1st. Where a will is found among the valuable papers or effects of the deceased; 2dly. Where it has been lodged in the hands of any person for safe keeping. In each case it is necessary, to support a devise of lands, that the will be in the hand-writing of the deceased, and that his name be subscribed thereto, or inserted in some part thereof. The act makes the circumstances of the will being in the hand-writing of the deceased, with his name subscribed thereto or inserted in some part thereof, and its being found among his valuable papers or effects, or lodged in the hands of some person for safe keeping, as equivalent to a publication before witnesses. And the publication shall be referred to *the date* of the will; not to the time of its being found among the valuable papers or effects of the deceased, or of its being lodged in the hands of a person for safe keeping. *Id.*
6. The probate of a will attested by only *one* witness being caveated in the County Court, an issue of "*devisavit vel non*" was made

up under the direction of the Court: and the Jury found, "that the deceased did, in the said will, devise *both real and personal* property." The caveator appealed, and in the Superior Court the Jury found, "that the paper writing offered as the will did devise as to personals, but not as to real estate." The executor offering the will for probate, shall pay the costs; it being his folly to insist in the County Court, that the will, being attested by only one witness, could pass the real estate. 436.

7. A. had a child born after he had made and published his will, and in his last sickness enquired of the Physician who attended him, and who was one of the witnesses to the will, "whether he thought him dangerous, and begged for a candid answer, for that his youngest child was unprovided for, and he wished to make some provision for the child." The Physician answered, "that he thought him better, and expressed a wish that he would postpone such a business to some future period." A. died, and it was held that the birth of the child after the making of the will, together with the declarations of A. to his physician, of his wish to make a provision for the child, did not amount to a revocation of the will. 447.

WITNESSES.

1. A witness summoned in any suit is bound to attend from term to term until discharged by the Court or party at whose instance he was summoned; and may be called out and forfeit fifty pounds, at every term he fails to attend after he is summoned. 181.

   And after being called out, a promise made to him by the party at whose instance he is summoned, not to enforce the forfeiture, if he will attend at the next term and give his evidence, is not binding, it being without any sufficient consideration. *Id.*
2. A witness summoned by each party in a suit is entitled to compensation from each. 188.
3. A witness for the State who is called out upon his recognizance, and has judgment *nisi*, for the forfeiture, entered against him, may apply to the Court for a remission of the forfeiture, before a *scire facias* issues against him. 269.

WRITS OF ERROR—REVERSAL OF JUDGMENT.

1. After judgment by default and before the execution of a writ of enquiry, the Defendant dies. The Plaintiff executes his writ of enquiry, and final judgment is rendered in his favour. This judgment is erroneous and reversible upon a writ of error. 43. See HEIRS AND DEVISEES.
2. The Plaintiff in error, upon a reversal of the judgment, is not entitled to restitution for lands sold under an execution issued upon the judgment, but to the money arising from the sale. 272.